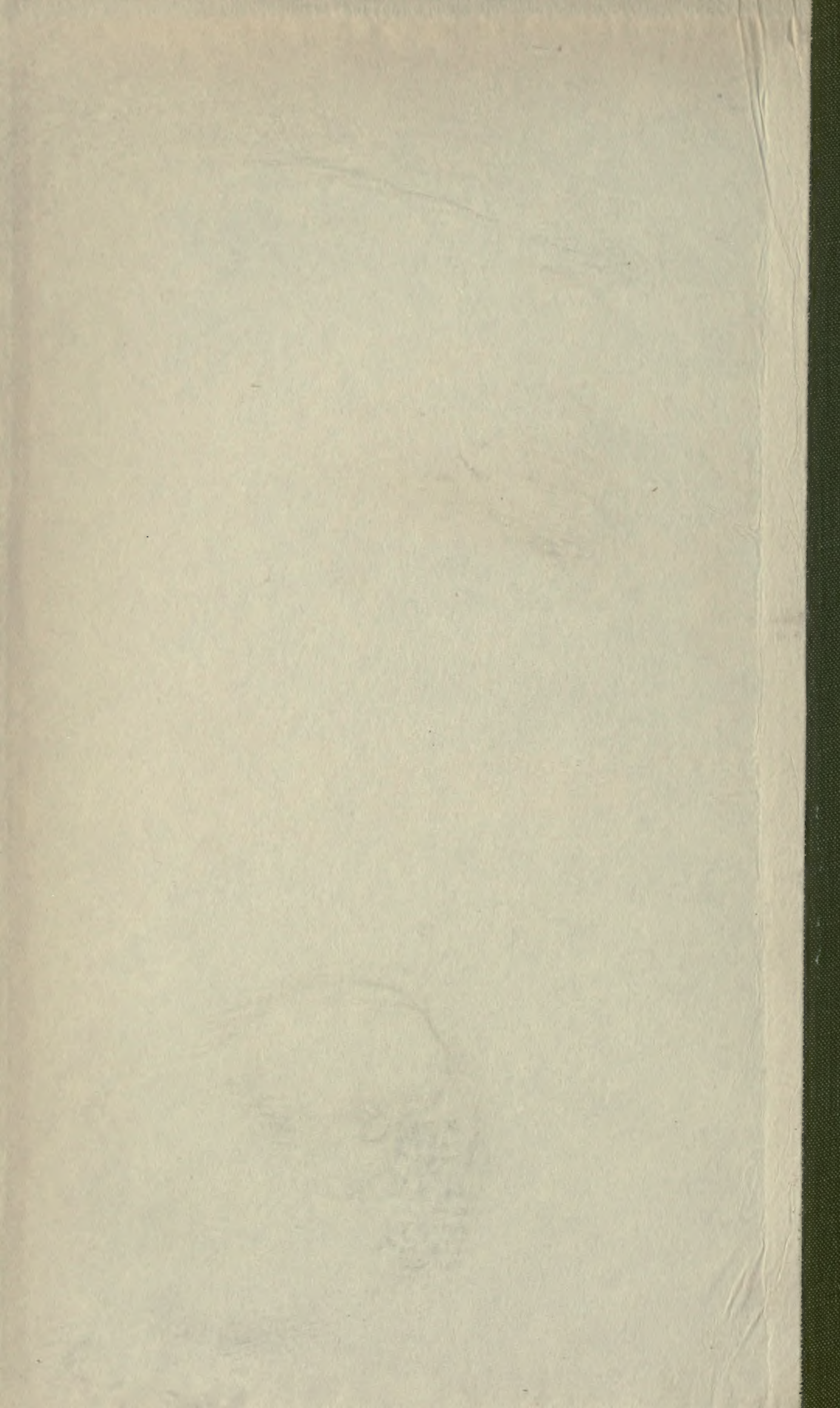




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(COMPTE RENDU DES SÉANCES)
DU
(TRIBUNAL D'ARBITRAGE)
(SIÈGEANT A PARIS, 1893)

(IV^E PARTIE)

(3-9 MAI)

REPORT OF THE PROCEEDINGS
OF THE
TRIBUNAL OF ARBITRATION
CONVENED AT PARIS, 1893

PART IV [^]V

31st
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SIXTEENTH DAY. MAY, 3RD, 1893.

Mr Foster. — I desire to inform the tribunal that within a few days (we hope during the course of the present week) we will deliver to the Arbitrators, the Agent and Counsel of the British Government a verbatim report of Mr Carter's argument as concluded yesterday; and we desire that that may be regarded as the only authentic version of it.

The President. — We shall be very pleased, of course, to receive the exact report of Mr Carter's argument; and we must take the version that you give us as correct. At the same time, I cannot help expressing a certain regret that the parties did not agree with one another for the arrangement of these verbatim reports. However, that is a secondary question; and I hope, Gentlemen, you will not make any difficulty about it, or have any feeling towards one another in reference to it.

Now, Mr Coudert, we are quite ready to hear you.

Mr Coudert. — May it please you, Mr President, and the Members of this High Tribunal.

At the close of yesterday's proceedings, the President of the Tribunal, in terms of graceful as well as kindly eulogy, expressed his opinion and, I am quite sure, the opinion of the other Members of the court as to the character of my learned Brother's argument, and congratulated him, as well he might, and also the Court itself upon the manner in which these most important topics have been treated; and he especially alluded to the lofty grounds which had been assumed and developed by him.

If I may be excused for referring personally to myself and trying in advance to crave and obtain the indulgence of the Judges whom I now have the honour to address, I may say in all frankness and without false humility, that I cannot expect from the nature of things that I shall receive the same honourable compliments at the end of my performance. I do not wish in advance, by giving an estimate of what I propose or hope to do, so to belittle myself as to diminish the share of the attention which I shall receive, but my brother Carter has gone so elaborately over the whole case with the exception of the facts and he has visited and taken possession of, occupied, adorned and fortified all the lofty grounds in such a way, that there is very little left of that part of the case for those who follow him in the argument.

To use an expression which will be familiar to two at least of the Arbitrators, he has pre-empted the best locations. He has taken the highest grounds, as the President has truly said, and they lack nothing by way of aid, illustration or argument. But it is a comfort to me that

he cannot stand unless I now come and give him some help. I must lay the foundation upon which the superstructure rests. He has assumed, and most properly, certain facts to exist in the case. If those facts exist, his argument is perfect. I do not under-estimate the value of my learned friends on the other side, for their reputation is not bounded by space or by the limits of the seas, and I know that they are ingenious, able, and experienced enough to meet any argument however sound and however excellent. But unless this argument of my learned friend is based upon fact, then indeed their contentions may prevail and all the learning and patient industry so lavishly bestowed upon his work will be in vain.

Like the house we read of, it would be built upon the sand. With a substratum of undisputed fact, of fact triumphantly demonstrated to be true, like that other building erected upon the rock, it must be impregnable! So that after all, though my task in discussing the facts does not possess those intellectual allurements to this Tribunal or offer it those attractions which it found so completely in the argument of my learned brother, yet perhaps the utility of my task may redeem it from any reproach that it is lacking in other respects. It is something to be useful and it will be a great deal if when I have sat down I may confidently claim, while admitting that I have been tedious, that I have so supported the argument of my friend that it has presented the whole case of the United States as well as it was possible to present it.

In this case, as in every other, the most important part or element of the discussion must reside in the facts, and it is satisfactory to me to know that I may, perhaps, give this court some instruction on the only subject as to which I am competent to instruct it the facts in a case like the diagnosis of the physician. His prescriptions are of no value unless the disease is ascertained, the condition of the patient found out, and then the applicability of the remedy discovered; and it would be of no value to us, and of still less value to this court, if you should find that in the abstract the arguments of my learned friend are unanswerable, and yet there were no facts to which they could be attached.

This is a long preface to say that I shall be mainly confined to the facts, but I shall endeavor, and I shall ask the patient and forbearing attention of the Tribunal, even if there be repetition in my remarks, to make those facts so clear and so strong that there will be no difficulty whatever in applying the remedy. This Tribunal knows the law. If there were any crevice in it that had been unexplored by their experienced and active minds, a flood of light has been poured into the darkness by my learned friend. The only question that remains now to enquire is, what are the facts upon which this argument is based.

But I desire, with the indulgence of the Court, to be permitted to argue one single proposition of law which has been touched upon by my learned friend, and to some extent argued, but it seems to me so important in the consideration of this case, and indeed, I might say, so vital,

that I should not be satisfied if I did not attempt to bring something in addition to what he has stated, because he has not poured upon it the flood of light which he has given to the other questions in the case. I refer to the question of self-defence of our industry. That is stated and most elaborately argued by Mr Phelps in our Argument on page 130 and following pages; and I shall ask your Honours to permit me to refer to the points very briefly, leaving you to give that careful perusal to the written argument which it undoubtedly deserves.

It is manifest that if we have an industry, and industry in the true, real, accepted sense of that word, an assault upon that industry is an assault upon us. When we speak of “ self-defence ”, we do not only mean self-defence in its ordinary and elementary meaning, but as an assault upon our person, or upon our most vital interest. I take it that the doctrine of self-defence arises and is put in motion the very instant any invasion of any right, however slight, is made.

It happens in this case (it is the good fortune of the United States that it should thus be) that you may obliterate the seals, every one of them, that you may encourage the pelagic sealers to do their best (or their worst, as you may choose to consider it); and that the race of these animals will be exterminated, as they must be, within one or two or three years. It may be that your decision will be such that we ourselves withdrawing the protection which is the life and I may say the creation of the herd, it will be obliterated practically and commercially in less time than that; and yet the United States will suffer a wrong that will not affect her greatness or her wealth in a perceptible degree. She can stand that assault upon her resources without impoverishing herself or distressing her people. That is her good fortune, in one sense, her misfortune from the purely professional view of the case. If this were a small Nation dependent for its livelihood and existence upon this industry which has been thus carefully cultivated for nearly a century, if she had no resources to feed her people but that, if it were the industry of the men who now live there and who have been transformed, by the beneficent hand of the United States, from barbarism to civilisation; if that were so, your sympathy would at once go out to these unfortunate people, and you would say they must be protected. There must be in the principles of humanity which regulate such matters and underlie international law, some rule, some principle, upon which destruction may be averted. It must be that there is something in the reasoning and consent of men which will interdict absolute destruction of their only means of livelihood. It is not so here. To that extent, we are worse off, or better off as you may choose to consider it, than would be the inhabitants themselves, if helpless, and eloquent only through their helplessness, they were to appeal to you. But I take it that when we consider this subject upon principle and upon rules and upon law, this does not enter into the consideration of the case; and we are entitled to have this consideration that if we have a right of protection and of self-defence, it is not the *quantum* or proportion of

the wrong; it is the quality of the act that you will consider; and if this indiscriminate and brutal slaughter is an invasion of our right in the slightest degree, then I appeal to you and, unhesitatingly but respectfully, say it is your duty to prevent it.

Have we an industry? The contrary of that can hardly be claimed. We are using intelligence; we are using money; we are using efforts to protect the seals for the purposes of commerce, for useful purposes to mankind; we are raising seals on the Pribilof Islands as sheep are raised in Australia, as cattle are raised in the far West. To carry that out, we use intelligence; we have invested a large capital; we have never been interfered with by men until within a comparatively recent period. We found the people there in a state of dismal ignorance, uncared for, and unprotected, living with as little regard to the laws of civilized life and Christianity as the very animals that they dealt with. They have been transformed by the hand of the United States pursuing this industry into a civilised, happy and Christian people. A small people, it is said by the other side, and truly said; but yet a people. An industry so called arises; a practice, I would call it, unworthy of being dignified by the name of an industry, it is conceded to be destructive in its effects and brutal in its methods. Perhaps if that were all, we would have nothing to say; but it is also plain, and will be made plainer in a moment, that the pursuance of that so called trade or industry is destructive of our rights upon those Islands. It is not worth while mincing this question, or trying to evade it. The industry on the Pribilof Islands and pelagic sealing cannot co-exist.

You must stop the one or destroy the other. The concurrence of testimony will show it, the undisputed facts will show it, and it may be assumed throughout, and it must be assumed, when this High Tribunal comes to make its decision and to formulate its decree, that you must elect between the two — between the process of civilization, of economy, of intelligence and preservation and the permission of a practice conceded to be brutal in the extreme, demoralizing to all those who are engaged in it and a crime against nature.

Perhaps even this is not itself sufficient, if we stopped there. This High Tribunal will say, what are your rights? Well in arguing before this High Tribunal the word “right” is most extensive. If there were any Tribunal of lesser dignity that could determine this question, we would not have called upon you. The mere calling upon you enlarges the domain of right. It is an admission that we are making a step forward in the way of civilization and humanity. You are here to declare what right is in these cases, unfettered by statutes, uncontrolled by limited jurisdiction, viewing the subject from a high and lofty eminence, for justice between the contending nations, and for the benefit of the world. If this be so, arguments drawn from statutes may be of little avail — you will want to know what principles underlie all these and what rules it is well for you to establish not only for the Government of Great Britain and the United

States in this particular instance, but rules that will operate hereafter to settle, in advance, the controversies between nations, and to allow civilization to pursue its beneficent course without threats, or disturbances of violence.

Now as to our industry upon the Island, I have said of what it consisted. It will appear from the case, (and this is an answer to a question one of the Arbitrators put a few days ago), that one of the moving inducements of the United States to pay this large sum of money to Russia was the fact that there was a valuable industry well settled, well recognized and undisturbed. If "prescription" means anything, I may say that it is founded upon, and supported by prescription.

Until within a few years, the idea of entering, at least upon Behring Sea, and slaughtering the mothers and pups upon our island was unknown. It had never been known of or as far as I have been able to read been disputed. It was the Pribilof industry on one side — it was the Commander Industry on the other, both beneficently and peacefully pursued. Now comes a new element in the case.

The world is moving on. It cannot stop. It must move for good or for evil; and new elements come in on the sea, just as they do in our own quiet civilized civic life. Something was said, and questions were asked about the rights of Indians who lived upon this industry, and whether we conceded that they had a property in the seal, if that question were asked me, I should unhesitatingly deny that they had any rights in the seals. That their efforts to make a livelihood by spearing an occasional seal were tolerated, I do not deny. That they would be tolerated to this day as an insignificant incursion into our territory, would not probably be disputed. But look at the difference, and this should not be lost sight of, That Indian going out a few miles from land with his spear to catch an occasional seal, what harm did he do to the herd itself? But the sealer with his six men in his boat, with the new weapons that have come into use within the last 20 years, the destruction is immeasurable, and if it be true that they may go on "improving" (if that be the word), these methods of violence and destruction, why should they stop at the rifle or the shot gun, and not employ dynamite?

If one be admissible, why is not the other? When we put the question to our friends on the other side: "Is *dynamite* a lawful way of killing fish? Suppose our intelligent and active sealers should find that having exhausted the supply of seals which Providence had furnished, it were better to indulge in destroying fish by that method, what is to prevent it, if we are wrong?" They say in their answer: "Oh, fishing by dynamite is unlawful fishing". By what law is it unlawful? It is not by some mediæval precedent that you can prove that, because, fortunately or unfortunately, as you please, in those times they had not found out how they could blow out houses in great cities with a handful of dynamite, or destroy regiments of men or of animals by its use. Why is dynamite more to deprecated than gun powder? Are they not for all

practical purposes of destruction, absolutely the same? And if our seals are to be destroyed lawfully to-day by the use of shot guns and rifles, why may they not, by improved methods of destruction, be more surely and speedily annihilated?

Now to start from a point that is certain, to reach one that may be certain, have we any rights of property at all as to the seals? Here, fortunately, all concede that we have, and it is said that upon the islands these are as much our property as though they were sheep or calves.

Sir Charles Russell. — Certainly not.

Mr Coudert. — Certainly not?

Sir Charles Russell. — Certainly not.

Mr Coudert. — Well, I gave you credit, and I will take it back. I supposed that when we held the seal in our hand — I supposed when we slit its ear — I supposed that when we could put a brand upon it, that it was our own, as much as it was, if it were a sheep or ewe. Where it comes in I am absolutely incompetent to say. I have read the argument on the other side with interest, and I supposed that it was conceded that upon our land, in our hands, under our flag, in our waters, they were as absolutely our property as *that* book is mine. I cannot prove it. There are some propositions that seem to me so self-evident that I shall not undertake the demonstration. If these seals are not absolutely our property, whose property are they? They are not the property of the world. They are not the property of Great Britain, for no British subject — no French subject — no Italian subject — no subject from any country upon the world, may come upon that land without being a trespasser, unless by my permission. And shall it be claimed that any man may go there and kill one of those seals — may destroy one of those pups without being liable to the law of the United States? I confess it is a new suggestion to me, and I will ask the Court to pardon me if I start from that, notwithstanding the contradiction by my friend on the other side, and say that for the purposes of this argument, I shall assume that our rights over the seals when they are on our land and in our hands, are absolutely ours. We may do with them what we like. To put an extreme case, suppose it were deemed important by the United States to kill every seal upon those islands, what nation in the world would have a right to find any fault? What nation in the world would say if it were deemed good policy — if it were advantageous to us — if there were a profit in it — would any nation have a right to say that it is not our property and we have not a right to kill them for our useful purposes? I take it that the best test of an exclusive property right is the question whether or not any other human being has a right to interfere, and until it is shown upon authority that within the three mile limit, and upon our own shores, under our actual dominion and the protection of our flag, some one else may interfere, I will assume that that property is ours. In fact I understood from the beginning that such was the concession but I care very little whether it is a concession or not. I take it to be plainly true.

Now this much I think will be conceded by the other side : that if the sealers come upon our territory and slay the seals that are there, whether they be the mothers or the pups, they are committing a crime for which they may be justly punished. The British Commissioners, whose work is the substratum of the case for Great Britain, say that raids are occasionally committed because our guard system is inefficient — that our guards are forbidden to shoot the people who come there and that we ought to have more efficient protection for our own seals. I do not understand that even they, with all the ardour of their advocacy, dispute the proposition that we have the right to repel raids even by force, and even so as to kill the marauding intruder. But how far does this affect the question at all? If you concede that they cannot directly kill our seals, then the question comes : May they do so indirectly? I may appeal to all of the Arbitrators who have judicial experience, and ask whether one of their most laborious duties has not been to prevent men from doing by *indirection*, that which the law absolutely interdicted? The law orders that a certain thing shall be done or shall not be done. Immediately the ingenuity of lawyers sets to work in the interests of clients to evade the prohibition and to evade the order; and the sagacity of courts is seldom better employed than in trying to find how they may best and most properly baffle those efforts at evading the law. Now will it be said that if these pups upon the Pribilof Islands are ours that we may issue a general edict of death and, like Herod, say that everyone under two years old shall be killed? If it be the fact that our power goes thus far, may they be destroyed indirectly? Here is my property, my pup, upon my land. It is suckled by its mother, and must perish if that mother dies. May a pirate or a poacher lie outside even, if you please, in that three mile limit, wait till it has crossed that imaginary line, and then kill my pup by the act of killing the mother? What sense is there in that? What principle is there in that? If the malefactor as I call him, if the poacher, if you please so to call him, to give him a mild designation, may not attack me directly and thus destroy my property, how can he do it thus indirectly, knowing that he is destroying that, *indirectly* which he has no right to touch? I think it will be difficult to give too much weight to that consideration, and when I shall have shown to this High Tribunal that the destruction of the mother is the destruction of the pup, and that the pup is under our dominion, in our hands, subject to our control, and our property, then I will ask the court to hold that these people can not indirectly do that which it is conceded they may not directly accomplish, namely the destruction of my property. If you destroy the means whereby I live, do you not take away my life? And if you may not take away the life of these young and helpless animals by slaying them with a gun or spear, may you do it by the doubly barbarous method of killing the mothers that sustain their existences.

Now upon this point, and reverting to the nature of pelagic sealing, we say not only that it is a practice barbarous and inhuman in itself, but

it is opposed to the law of all civilized nations. It is opposed to the law of the United States. It is opposed to the law of Great Britain. In fact, I know no law which does not interfere to protect useful animals by preventing the wholesale slaughter through the medium of the mother. It is stated on both sides, in considering the question of international law, that the law common to all countries is the one to be looked at, and my friends on the other side say, (and I am not disposed to find any fault with that statement of their views), that the law common to both countries — Great Britain and the United States — is to be examined on these subjects, in order to ascertain what the international law may be.

Now is not this common to both countries? Do not both countries prohibit this as wrong? Do not both countries claim that it is criminal to kill the mother under those circumstances, and thus to use up the stock? As my friend Mr Carter has said, it is spending the capital and impoverishing the individual; and the man who spends his capital recklessly and wilfully brings destruction only on himself; and yet, in some countries — here, I believe, the law beneficently steps in to guard him against his own imprudence, and will not allow him to squander his substance : it puts a guardian upon him. He can make no contracts; he can take no financial steps which entail responsibility, because he is not fit to take charge of the capital which he has possessed. And so it is in all these cases where the capital is destroyed, the whole source of happiness and prosperity is gone.

Now it is claimed that these are animals *feræ naturæ*. I do not think the proposition is helped by giving it a Latin name, even if it is consecrated by long usage and time. They are “wild animals” it is said, and wild animals have no protection under law. That is one of the grounds. The other ground is that the sea is free — that commercial nations cannot accept the idea, or tolerate the claim that depredations of this kind can be interfered with. Well, let us look at this for one moment. In the first place, are the animals *feræ naturæ*? Perhaps the arbitrators may have thought, before coming into this Court, that they knew something about the nature of the seal; but any such idea, however flattering it may be to themselves and to their idea of their own knowledge, will be promptly dissipated by looking at the conflict when we tried to agree upon what a seal really is; and if the views of my friends as expressed by the British commissioners be correct, the seal is one of the marvels of nature. They have undertaken to define it. It would be unjust to them to give merely a synopsis of their definition, and I propose to read from their own work, and to show this Court what an extraordinary animal it is. I am sure you would all like to know at the very start what a seal is. It is well, when you are dealing with an animal, to know what designation to give it, especially if you are a Frenchman; *J'appelle un chat un chat*; but it not always easy to know whether you have the right to call it a cat; and as to this extraordinary animal that we are dealing with, it is claimed on the other side that it is an essentially marine animal — that it

comes upon land merely because its instinct tells it to come — merely because it is necessary for the insignificant purposes of breeding, nursing feeding and raising the young; and if nature did not tell them to do it, and if it was not indispensable to their life, they could do without it.

Those propositions we are disposed to agree to, but it is only another way of saying that the Almighty, or if you prefer it, Nature, has inculcated in these animals certain laws necessary to their preservation and which they must fulfil under the penalty of death. Nature is severe in her punishments; she is inexorable; she cannot be mitigated or avoided by ingenuity. Animals show more wisdom than man by giving at once implicit obedience to the inevitable; and all that may be said about them is that they come to these islands because they cannot help it. If they did not, they would perish. If they were repulsed, then they would perish — if they had no such place as ours (and that is the only place they have) the race would die. This marine or pelagic animal lives upon the land about eight months in the year. If it did not live eight months in the year there, notwithstanding its pelagicity (to take the new eloquent expression that has been coined, if not for this case, at least recently introduced), notwithstanding its pelagicity, it would perish, and what is more remarkable — and I have not yet stated it with regard to this animal which is essentially a marine animal — is, if it is born at sea it dies. It is called a fish; but it will only live on land during a part, at least, of its existence; and if it is deprived of a terrestrial abode, it must perish from the surface of the earth and from the water. It is a tame animal; it is easily taken; it is handled as readily as a lamb. The process of selection for slaughter on the islands is a simple one. The animals are driven precisely as sheep, but apparently with more ease. These animals *feræ naturæ* — they are likened to wild geese and like them are so domestic, if that be an appropriate expression, or so tame, so gentle, so easily killed, that they can be driven into a pen by the hundred — those that ought to be killed may be selected, and the rest may be dismissed.

Now I submit that under these circumstances to call these animals *feræ naturæ* is a misnomer. Granting if you please that they are amphibious animals, granting that they are put to no useful purpose except those of food and the use of their skins, how and in what sense are they animals *feræ naturæ*? They go to sea it is true, but it is only because there they find their food.

As one of the experts, whose depositions I shall read to the court in a moment, has said, not only is the seal a domestic animal, but it is one of the most profitable of domestic animals.

Without going so far and looking at the reason of the law, I shall claim that it being established that these animals on these Islands live on land protected by man during the greater part of the year and never leave, never for a day or for a season without the intent of returning, that, in the eye of that law which this High Court is called upon to administer, they are not animals *feræ naturæ* but must be likened, for the purpose

of this discussion, to domestic animals raised, cultivated, protected, handled and used for beneficent purposes by the hand of man. They do not fly off as bees do, which may or may not return, and yet bees are protected so long as they have that *animus revertendi*. They are not like wild geese or wild ducks; they are, of you please, of their own kind. It is an animal *sui generis*. It may be called an amphibious animal, though I do not know that even that would be a just expression.

Buffon speaking of the otter that has been likened to the seal in this discussion, says it is not fair to call the otter an amphibious animal because he partakes so largely of the character of a land animal. But however that may be; call it, if you please, an amphibious animal with a single home which it never leaves without the intent to return, — where such an animal as that is concerned, is there no protection because the seas are free? The freedom of the seas is as important to the United States as to any Nation in the world perhaps; I might say, owing to the length and extent of its seaboard, more important than to any Nation, Great Britain possibly excepted; and if it be that we are by our contention attempting in any way to interfere with the freedom of the sea, then we are wrong. The freedom of the sea is more important than the life of the seal. It should not be interfered with. But I claim, with all respect to this High Tribunal, that, so far from interfering with it we are promoting and extending it; that the freedom of the sea, in the language of Chancellor Kent, is meant for inoffensive purposes and not for the purpose of license to do wrong. Under the circumstances, if it be true that we have property to a certain extent at any time upon the Islands, then the question is, when is that property lost? Is it lost in the herd when that herd is leaving or approaching the Islands for its annual and necessary migration? Is it lost in the females of the herd when attending to their young on the Islands and passing outside the territorial line? They leave the young on shore, where they perish if their mothers are destroyed. Either in one of those two cases or nowhere is the property lost. It is either lost in the annual migration when the mothers are travelling to and from their home; or it is lost when the mother, going out for sustenance for herself and her young, is killed by the pelagic sealer.

Now I submit to the court that by municipal law that is recognized as well as by international law — by municipal law our right here is every where recognized. In Mr Phelps's argument this subject is discussed most carefully and clearly and I shall read merely a few extracts in order to give point and life to my remarks. I read from page 132 :

Even upon the ordinary principles of municipal law as administered in courts of justice such a property would exist under the circumstances stated.

The circumstances, that is, that I have just stated as to the emigration of the seals and the temporary absence of the mother :

It is a general rule, long settled in the common law of England and America, that where useful animals, naturally wild, have become by their own act, or by the

act of those who have subjected them to control, established in a home upon the land of such persons, to which the animals have an *animus revertendi* or fixed habit of return, and do therefore regularly return, where they are nurtured, protected, and made valuable by industry and expenditure a title arises in the proprietors of the land.

Can there be any dispute as to that proposition being sound? Now how far does that title go? Does it not as we state here enable them

To prevent the destruction of the animals while temporally absent from the territory where they belong; a title, however, which would be lost should they abandon permanently their habit of return and regain their former wild state.

Here is the only difference I submit between the case of these animals which we will call amphibious animals and other animals that never leave their home. Our title is absolute. I do not recognize these mitigated forms of property. What is mine is mine, only it is subject to defeasance. It is subject to defeasance and different in that respect from other questions of property in this, that I cannot lose my title to my sheep, my cow, or my horse except by my own act or the superior act of a superior power. But here my title depends to a great extent upon the will of the animal. The animal has an *animus* in this case and has no *animus* in the other. When it is a tame animal in every sense of the word, recognized as such by law, and subject to my control always and for ever, then I cannot be divested even if it should stray, and go into the property of some other man.

If he kills it, he is guilty of a crime and if these animals leave without that intent then they have divested us by their act of the property notwithstanding our intent to keep it then Mr Phelps proceeds and he justifies this assertion.

It is under this rule, the justice of which is apparent that property is admitted in bees, in swans and wild geese in pigeons, in deer, and in many other animals originally *feræ naturæ*, but yet capable of being partially subjected to the control of man, as is fully shown by the numerous authorities cited in, and appended to Mr Carter's argument.

The case of the seals we submit is stronger than any of these. There is no case that stands so close to the case of an absolutely domestic animal, without being if you please in every sense a domestic animal, as that of the seal. In that particular it is, as I said, *sui generis* as is stated in the Argument.

Their home on American soil is not only of their own selection but is a permanent home, necessary to their existence and in respect to which they never lose the *animus revertendi*.

Now we know from records that for a century before that an *animus revertendi* has been constantly and tenaciously exhibited and possessed. The municipal law has been fully gone into by Mr Carter, and I pass from that subject. Now, have we any rights under the international law.

The proposition is laid down in this way, and supported by authorities to which I will call the attention of the Tribunal.

But upon the broader principles of international law applicable to the case, the right of property in these seals in the United States Government becomes still clearer. Where animals of any sort, wild in their original nature, are attached and become appurtenant to a maritime territory, are not inexhaustible.....

I beg the attention of the Tribunal to that element in the case, thus making them differ from these boundless schools and shoals of fish of which so much has been said.

Where animals of any sort, wild in their original nature, are attached and become appurtenant to a maritime territory, are not inexhaustible in their product, are made the basis of an important industry on such territory, and would be exterminated if thrown open to the general and unrestricted pursuit of mankind, they become the just property of the Nation to which they are so attached, and from which they derive the protection without which they would cease to exist, even though in the habits or necessities of their life some of them pass from time to time into the adjacent sea, beyond those limits which, by common consent and for the purposes of defense, are regarded as constituting a part of the national territory. In such a case as this, the herd and the industry arising out of it become indivisible; and constitute but one proprietorship.

This High Court will observe that in discussing this question of the industry a distinction is made between property in that industry of which the herd is a part, and property in the individual seal. I am not in the slightest degree disposed here to minimise the force of the argument that this herd is ours, and every individual seal belongs to the United States; but my purpose is just as well accomplished if the High Tribunal takes the view that, even without going to that extreme length (if it be extreme) the United States have an interest in this industry, founded by Russia, nurtured, fostered and protected by itself—that that industry is one susceptible of protection by international law.

But what is the right of property in the herd as a whole, in the seas, and under the circumstances in which it is thus availed of by the United States Government as the foundation of an important national concern, and in which it is assailed by the Canadians in the manner complained of? When this point is determined, all the dispute that has arisen in this case is disposed of.

And Puffendorf and Vattel are both cited in support of this. I will not take up the time of the Tribunal to say at length what they say, but simply content myself with an extract from each, with regard to fishing, and that is very different from the pursuit of the seals, as I have tried to show how much stronger the case of the United States with regard to seals may be, but this is what Puffendorf says :

As for fishing, though it hath much more abundant subjects in the sea than in lakes or rivers, yet 'tis manifest that it may in part be exhausted, and that if all nations should desire such right and liberty near the coast of any particular country, that country must be very much prejudiced in this respect; especially since 'tis very usual that some particular kind of fish, or perhaps some more precious commodity, as pearls, coral, amber, or the like are to be found only in one part of the sea, and that of no considerable extent. In this case there is no reason why the borderers

should not rather challenge to themselves this happiness of a wealthy shore or sea than those who are seated at a distance from it.

Then Vattel says :

The various uses of the sea near the coasts render it very susceptible of property. It furnishes fish, shells, pearls, amber, etc.; now in all these respects its use is not inexhaustible. Wherefore, the nation to whom the coasts belong may appropriate to themselves, and convert to their own profit, an advantage which nature has so placed within their reach as to enable them conveniently to take possession of it, in the same manner as they possess themselves of the dominion of the land they inhabit. Who can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become property ?

We do not doubt it. We do not dispute it, though we do dispute, as Mr Carter has stated, the grounds upon which that title is asserted, and that right is supposed to exist.

And though, where the catching of fish is the only object, the fishery appears less liable to be exhausted, yet if a nation have on their coasts a particular fishery of a profitable nature, and of which they may become masters, shall they not be permitted to appropriate to themselves that bounteous gift of nature as an appendage to the country they possess.

Is not that precisely our case? Is not this “ an appendage to the country that we possess ? ” If not, what is it? Does not it depend upon the country that we possess? Is not the true condition of its existence dependent upon the country? Do not the United states hold the life of the seal in their very hand upon their territory? Is not it, then, in every sense of the word, “ an appendage of the territory that we possess ? ” And so it is with Ceylon; and so it is with those coral fisheries of which they have spoken. Those are marine industries connected with the territories of the nation; and for that reason conceded by general consent and by international law to those nations, whether it be to Italy, to England, or to France.

A nation may appropriate to herself those things of which the free and common use would be prejudicial or dangerous to her.

Can anything be more explicit or more conclusive on this point? The common use would be prejudicial most certainly and dangerous to the United States, — not only prejudicial but fatal to the United States as far as this industry is concerned.

This is a second reason for which governments extend their dominion over the sea along their coasts, as far as they are able to protect their right.

Then, if the Court please, I was proceeding to read further from Mr Phelps Argument an extract which I deem most material; but it is well to preface it with the reflection that the seal exists today simply because we from its slaughter. History has shown, and we know precisely, what would become of the seal of the North, because we have the experience of the past. As Mr Buckle has said, the office and function of history is to show us from a study of the past what will happen

in the future; and we know that indiscriminate slaughter on land is fatal to the race. The vacant seal rookeries of the South tell the story in the strongest and most eloquent terms. In one year, when the authority of Russia was removed and that of the United States relaxed, or not yet in force, 240 000 seals were slain in one single year; and yet this industry was in its infancy. What would have become of it in the next year? And the next?

From such a slaughter, the United States is not bound to refrain, if the only object is to preserve the animals long enough to enable them to be exterminated by foreigners at sea. If that is to be the result, it would be for the interest of the Government and plainly within its right and powers, to avail itself at once of such present value as its property possesses, if the future product of it can not be preserved. Can there be more conclusive proof than this of such lawful possession and control as constitutes property, and alone produces and continues the existence of the subject of it?

That is to say, if the decision of this High Tribunal should be that indiscriminate pursuit and indiscriminate killing are to be tolerated and encouraged, then the United States have the right (whether they would exercise it or not, I cannot tell) of availing themselves of, and using for their own purposes and benefit, the animals within their reach and under their control rather than to allow them to become the prey, under the most cruel and inhuman circumstances, of those who cease to respect what they have hitherto considered to be their rights. The Minister of the United States to Great Britain used the expression which was the subject of some discussion, that this pursuit of the seal under the circumstances stated and explained, was *contra bonos mores*. I submit to the court that he did not exaggerate; that if anything is against good morals, which is by its nature calculated to undermine sound principles of humanity and to contract their growth, this pursuit directed almost exclusively against that class of animals that are the favoured children of the law in other civilised countries, — that pursuit must be against good morals. It is not possible that a pursuit which is likely, nay which is certain, to exterminate a useful race can be permissible. Some remedy must be found. This High Court will find it, and must find it; but, as it is conceded by all that it is a useful race, as it is being diminished and ruined and destroyed, surely the result must follow, and some remedy must be applied. Therefore, it is said in this brief, as will be found at page 138, that.

The method of pursuit employed by the Canadian vessels, and against which the United States Government protests, not only tends to the rapid extermination of the seal, but is in itself barbarous, inhuman, and wasteful.

Can there be any question about that? If there is now, there will not be when this High Tribunal has heard the evidence read. So far as the Legislation of the United States is concerned. —

The killing of female seals at any time is made criminal by the Statutes of the United States.

The destruction during the breeding season of wild animals of any kind which are in any respect useful to man, is prohibited, not only by all the instincts of humanity, but by the laws of every civilised country, and especially by the laws of the United States and of Great Britain.

And we have to start, in trying to ascertain what law may be applied to this, with the common consent of both Nations that this practice is both wrong and criminal.

The depredations in question, dignified in the Report of the British Commissioners by the name of an industry, are the work of individuals who fit out vessels for this purpose. Their number, though increasing, is not great. The business is speculative, and as a whole not remunerative, though it has instances of large gains which stimulate the enterprise of those concerned, and make the prospect attractive, like all occupations which have a touch of adventure, an element of gambling and a taste of cruelty.

And I may add, in this connection, as an evidence of the kind feeling of the British Commissioners whose Report, as I have said, is the most important element in the British Case, that they have advanced, and we must be grateful to them for the kindness which it evinces, an argument why we of the United States, should encourage pelagic sealing. I am sure that the ingenuity of the Arbitrators collectively or individually would never guess what that advantage is, so I will tell them. It is that, by encouraging pelagic sealing, we will create for ourselves a nursery of brave and hardy seamen! I do not think that either Great Britain or the United States need that nursery. I think the atavism on both sides for making good sailors to fight the World, and each other included when they have nothing better to do, need not be encouraged by slaughtering female seals in the Behring Sea.

Against this injury, which the United States Government has made the subject of vain remonstrance, there are absolutely no means of defence that can be made available within the limits of territorial jurisdiction.

No fortifications can protect the young seal against the death of its mother and consequent starvation. The 3 mile limit is no defence; they are not slain within the three miles. They go out for food, and they go beyond 20 miles.

As it is impossible, when seals are hunted in the water, that the sex can ever be discriminated before the killing takes place, it follows that if what is called pelagic sealing is allowed to be carried on, the enormous proportion of pregnant and suckling females and of nursing young, before referred to must continue to be destroyed.

Then comes the question of raids. The raid is an attack made under cover of the night, or of the fog, by bolder and more experienced men perhaps who are willing to take the chances of being shot, which the British Commissioners suggest ought to be greater, — men who are willing to invade a friendly territory and, in a night, to get such a number of seals as will justify the expenditure of money, such as it is, and compensate them for their risk. So far as the raids are concerned, the United

States ask no help from this High Tribunal, or from anyone else; but you will bear in mind that, when you kill pelagic sealing, if you do, you also dispose of the raids. The raiders are the men who hover around the coast, who come in, as I have said, under favourable circumstances to their pursuit and, having a right as they claim it, a right which we deny, to beseen in those seas for the purpose of hunting seals, take advantage of every opportunity to come upon the shore and operate their mission of destruction. This, so far from being an argument against the contention of the United States, is one of the very strongest arguments that we can use against pelagic sealing. Raids are most destructive. There was no pelagic sealing, it is true, that destroyed the southern seals. Why? because it is so much easier and more profitable to go upon your neighbour's land and to take his property there than to scour the sea in quest of something uncertain and undefined; and the only reason why pelagic sealing was unknown in these southern seas is that it was so much easier to go upon land where these animals were collected and to slaughter them there. Whether the effect of the decision of this High Tribunal will not be to save the seal all over the world, is a question which I need not discuss; but it is a comfort and a reflection to believe that in our advocacy of the rights of the United States and in our denunciation of this cruel and barbarous method of destruction, we are perhaps the advocates of Great Britain as well as of the United States. The question is a larger one in every respect. It is one well worthy the consideration of this High Tribunal and all the attention that it can give it. It is not only the protection of our property; it is the establishment of a great and beneficent principle which will operate for the whole human race. So much for the raids.

Senator Morgan. — Mr Coudert I wish to inquire of you whether you have examined into the question whether under the Treaties between the United States and Great Britain the citizens of each country have not the right to enter into the other for any innocent purpose without being prohibited?

Mr Coudert. — I suppose that that is conceded, there is no question about it and when I spoke of "Pelagic sealing" I am speaking of a criminal act. The sea is open to all for innocent purposes, and I might concede for the sake of argument that the British sealer has just as much right to kill seals as ours. It is stated in argument a great many Americans do it, and in fact we claim and we contend that *mutato nomine* the Canadian is often an American. I have no doubt that that is so, and that in order to evade our law he borrows the British flag to carry on his depredations more safely. But it is not a question of nationality.

The President. — You mean in the Behring Sea.

Mr Coudert. — Yes.

The President. — Not on the coast.

Mr Coudert. — No, not on the coast, in the Behring Sea. We have not yet undertaken and we come to this Court to prevent that.

Senator Morgan. — But if the killing of seals on land is not the destruction of the property of the United States and the British subjects have a right to go there without interruption, may they not go there to hunt and kill the seals on the land as well as wild ducks?

Mr. Coudert. — Yes, they may if we have no right to them. If I have no right to my horse, and my friend who has a pass to enter my property he may there ride away on my horse, I cannot stop him if he has a right.

Senator Morgan. — Then we could not possibly prevent a raid upon our islands being made for the innocent purpose of killing the seals.

Mr. Coudert. — Certainly not, and if it is an innocent purpose, unless we put a Chinese wall over our territory we cannot prevent it. But if it is our property, and if as I insist most respectfully, the seal is just as much my property as any animal, however domestic, the moment they get there, there is the *animus furandi*. They are thieves, they are robbers; they are open to and subject to the criminal law of any country.

The President. — You mean in this case the United States possess these seals — this seal property — as individuals.

Mr. Coudert. — Yes.

The President. — That is why it is poaching?

Mr. Coudert. — Yes, the United States as a Government owns this land, and owns this industry, and has a qualified property such as it is. Russia has transferred all the rights that it had. The United States might have done one of two things. It might as a Government or as a Corporation, if you please, have undertaken to raise seals. That subject was discussed and Senator Morgan knows it, for he was in the Senate of the United States at the time, I believe. Or a Corporation could be formed which would have the privilege of killing a certain number or an uncertain number—there was a maximum but no minimum—subject to the regulations of the United States, and the question came up in Congress which was the one they should adopt. Well now, the United States are, I am very glad to say, reluctant to go into any business except that of governing our people, and the less they govern it, the more they like it. That is the function of the United States, to do as little governing as possible; and to go into seal raising, seemed to a great many men a subject that should be avoided. Then there was only one other alternative to form a Corporation, under the best circumstances for the preservation of the seal and the exploitation of the industry. Now the title to these seals is in the United States. It is appurtenant to its soil; it is an out-growth of the soil; it is connected with the soil; it is inseparable from the soil.

The President. — At what moment do the lessees become owners of the soil according to you?

Mr. Coudert. — They never become the owners, if the President pleases. They have under us, and subject to us, the right to kill the surplus product. When that is done under our supervision and they have

paid the United States a certain tax upon the skin, that skin is absolutely theirs.

The President. — It is only the skin.

Mr. Coudert. — It is the skin.

The President. — The dead body does not belong to them even.

Mr. Coudert. — Well, the body being entirely valueless, no question has ever arisen that I know of on that subject, and I would not like to commit myself.

The President. — I would like to know myself in order to fix the point.

Lord Hannen. — Then how about the oil? Is not oil extracted from them?

Mr. Coudert. — Only to a small extent.

Senator Morgan. — And the oil is also taxed.

Mr. Coudert. — Yes, I am obliged for that. The oil is taxed, but the residents also use the carcasses for food.

I was answering one of the legal Arbitrators first and I will come back to the fact. It is a test and an excellent test as to the question in which I though we were agreed, but from my learned friend Sir Charles Russell's remark I think that we are not. I think that Senator Morgan's suggestion affords an excellent test as to my position with reference to the right of property on the Island. We don't dispute that friendly nations may come upon our territory if they are guided by no bad motive and animated by no hostility. If however, they come to these Islands in a sealing vessel with men armed with gaffs and rifles, we know that they are malefactors. We know that they do not come there to enjoy themselves the climate is not one that permits it and the social amenities are not of the most attractive order. Most excellent gentlemen some of whom are here present have lived on those islands, and it would be worth visiting the islands to visit them, but there is no certainty that their occupations would permit them to extend the hospitalities of the case, and when men go there with certain appliances you may be absolutely sure that they are going there on a raid, especially as they never go there in broad daylight but select a foggy day or a dark night.

Now pursuing this suggestion of Senator Morgan's what right have we to repel raids?

Senator Morgan. — Yes, that was the point of my suggestion.

Mr Coudert. — Yes; I do not understand from the other side that they have yet claimed, though I do not know in the evolution of arguments what they will claim, that we could not prevent a raid; if so when we bought the seals from Russia we paid a very large price for the animals. If there is any further argument in that I will leave it to my Associate who will close the discussion. So far I have been unable to see any ground upon which the claim that so long as these seals were in our land and attached to it they were not absolutely ours, *uti et abuti*, to do as we pleased with, can be refused.

Now Chancellor Kent has laid down the rule in a very few lines. I do not know how far his fame has penetrated to the continent. Our jurisprudence is in many respects very different, and it may be that his commentaries, though greatly respected by us, and indeed in Great Britain also, may not have attained the same reputation here as they have with us.

The President. — Yes, indeed, we know Chancellor Kent.

Mr Coudert. — Your excellent knowledge, Sir, of the English language has, no doubt, permitted you to enjoy the perusal of his lectures; but it is no affront, I am sure, to say that the English language is not so well known all over France.

The President. — I believe that the name of Chancellor Kent is known all over Europe.

Mr Coudert. — I am indeed glad to hear it, because then I can read, with double assurance and comfort, what he says, which is at page 143.

Every vessel in time of peace has a right to consult its own safety and convenience, and to pursue its own course and business without being disturbed, *when it does not violate the rights of others.*

The freedom of the high seas for the *inoffensive* navigation of all nations is firmly established.

You will see the cautious language that that great Jurist uses.

Sir Charles Russell. — That last statement is that of an English judge, and not Chancellor Kent.

Mr Coudert. — Does not Chancellor Kent adopt it?

Sir Charles Russell. — It was long after Chancellor Kent.

Mr Coudert. — Well, I do not object to it for that reason. Perhaps in some respects it is all the stronger. I am sure, however, it is precisely the same idea.

Sir Charles Russell. — Well, not quite.

Mr Coudert. — Chancellor Kent, says that a vessel in time of peace may pursue its own course and business on the high seas *when it does not violate the rights of others.* If it does violate the rights of others it is not *inoffensive*, and, therefore, the sentiment is the same. Still I am obliged to Sir Charles Russell for correcting me. I was wrong.

So with regard to Mr Justice Story, another of our most distinguished jurists, and long a member of the Court to which one of the Arbitrators now belongs.

Every ship sails there (in the open sea) with the unquestionable right of pursuing her own lawful business without interruption; but whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is *sic utere tuo ut alienum non lædas.*

Are they doing us no injury when they destroy our property by killing the pups through killing the mother? Are they using their rights without injury to us when they are destroying a valuable and a costly industry? The questions answers itself.

The safety of a state, and the protection of their commercial interests, were not sacrificed to the idea of the freedom of the sea. That freedom was conceded for the proposes of such protection, and as affording its best security.

And if we study this question, this development of the rule of the freedom of the sea, a principle which was long opposed by some of the wisest and best jurists in Great Britain, we will find that it was for the capacity of the protection that it afforded to all nations, but never as a vehicle for wrong-doing — never.

So far as the freedom of the sea is concerned, if we have any rights, the slightest rights, the doctrine of the freedom of the sea and the shibboleth that liberty on the great ocean belongs to all people to do as they like has nothing to do with the discussion of this question. A wrong is not made right because a man is in a ship. Right does not abdicate because it steps upon the quarter-deck of a schooner or a man-of-war, or any other vessel. Right is right on land and on sea, and the expansion of civilization makes that proposition clearer and more applicable every day. Then it comes to this: We have an industry; we have property on the land. That property is ours; it is appurtenant to our soil. These animals are different in that respect from absolutely domestic animals. They go out for food and killing the mother kills the pups upon our soil. May we not protect them? What is there that forbids that we should invoke those ordinary principles of right? There is nothing new about it. Some very wise man many years ago said, "There is nothing new under the sun". There is very little new in law.

Of course, codifications may introduce, by express enactments, new ideas into the Code that governs a municipality or a nation; but when we are dealing with these great questions that do not depend on written law, used arbitrarily perhaps by one nation for the government of its citizens, we must look to those broad principles of right which prohibit wrong and encourage right, and which are common to all the civilized nations of the globe.

The question is, what is right? Now, is there anything new in our claim, and, if so, what? In what respect is this new? Lord Coke, I think it was, once said that, in all his experience, he never had but one or two questions of common law that bothered him at all. Why? Because it was founded on usage; upon usage that was accepted by all the intelligent civilised people that composed his nation. It was founded on custom; it was founded on right. Sometimes the right of today grows so with time that it is not recognisable. Sometimes that which is permitted today, as in this case the killing of individual seals with a spear, becomes wrong and criminal if done in such a way as to destroy a race of animals. But all that we ask is not the application of new, but the application of old principles to this. It is not a new case in any sense, except that, by the nature of these animals, it is stronger than any other case that you can imagine. That is all in it that is different. It is different because the habits of this animal are so nearly akin to those of a and and domestic tame animal that the analogies taken and given here in our briefs fail to cover the case. They are too small. We go away beyond those analogies. If those illustrations are good, *a fortiori* are we

right; but even if they fail in any sense, still we will be right because the animals with which we are dealing are so different in important respects, all favourable to us, that you can apply a rule, not new in its principle, but new in its application.

How are these rights to be enforced? There is only one of two ways; either to do as the United States began to do, — to do as Russia has insisted upon doing. “We are right; this is our property. No one shall interfere with it”. Or to come before you, not abandoning or waiving one iota of our right or of our claim; but, as Mr Carter so eloquently stated yesterday to avoid all possibility of collision, waiving what we claim to be ours and submitting to an impartial and intelligent and enlightened Court to lay down a principle that will go far beyond our necessities and the necessities of the other side, to be a beacon perhaps for future times and future generations.

Nor do I think it necessary here to consider the 3 mile limit, or the question of jurisdiction. These matters are entirely separate and distinct. For the purpose of this argument, we concede that all the nations of the globe, — I desire to be very careful here, — for the purpose of the particular point I am arguing, we are willing to concede that all the nations of the globe have the same rights in Behring Sea as we possess ourselves. The same right to go and to come; the same right to stay or to leave; the right to do everything that is right; the right to do nothing that is wrong. And thus we always come back to the question whether it is wrong to destroy our property against our will when we are helpless unless we invoke force? I desire also to call the attention of the Court before closing this branch of the argument to the fact that upon the principles I have tried to make clear as those for which we contend, all marine property is held; that is, all that kind of property that is spoken of in the respective arguments of Counsel.

Instances are given here — and as my friend Mr Carter has dwelt so much on those points I shall merely allude to them — instances are given here of cases where great nations have claimed rights outside the jurisdictional limits the arbitrary three mile limit — going out twenty, thirty, fifty, hundreds of miles; and the coral beds of Great Britain and of Italy, and the fisheries of France have been spoken of. Not only to protect coral beds, but to protect oyster beds — to protect seals, for, after all, Great Britain has become alive to the fact that a valuable industry of hers was in process of rapid destruction, and she has endeavoured, and is now endeavouring, to shield and protect these animals; and the arguments that have been made by Mr Carter and the few remarks I am making upon this subject, should not be understood as any in the slightest way disputing the right of Great Britain, Italy and France to this property, only I may be permitted to say — and I hope that it will not seem presumptuous when I say it — that the tenure must be indeed frail if it rests on the argument stated by the British Commissioners, whereas it is impregnable if I am right, and if the arguments

used by Mr Carter are applicable to the case. This property does belong to those nations — not I think because it happens to rest upon the bed of the sea, but because it is an industry belonging to those nations connected with their territory and conceded to them, *ex necessitate*, by the common consent of mankind.

Marquis Visconti Venosta. — I will say in regard to the observation of Mr Coudert that the Italian Decrees do not apply to foreigners. The three Decrees cited in the case of the United States are an addition to the Regulation of November 13th 1882 which is made to apply the law of March 4th 1877 on fishing, and this law in its 1st article as well as the Regulations limit their zone of application to the territorial waters. The coral Banks of Sciana where fishery was forbidden for some time, are outside the territorial waters; so those Decrees were not applicable to foreigners if they went there; but the industry in fact, is exclusively carried on by Italian citizens. I must add however that this prohibition has now been repealed.

Mr Coudert. — Yes, I was coming to that question — the distinction between citizens and foreigners, and the privilege that the rule would give to foreigners over citizens. Of course, if as the Arbitrator says, and I desire to be instructed by him.

Marquis Visconti Venosta. — It is a question of fact.

Mr Coudert. — I desire to be instructed by him either on the facts, or upon the law, and he is quite competent to instruct me on both — of course if the industry is carried on in territorial waters, it is not applicable at all; I concede that. If it is within, say three miles, of course Sir Charles Russell might object to it on the ground that he objects to our owning seals on our land. How Italy is going to own coral beds three miles off, if we do not own seals on our land, I do not know. But it is not the question I propose to discuss, though I will come in a moment to the question how far these statutes apply to citizens, and not to foreigners or aliens. I am much obliged for the correction, and of course if this is within territorial waters, I leave the subject of Italian coral fisheries out. But one illustration is as good as ten, and it is manifest that in some of these cases here cited the protection goes much further than the limit of territorial waters. On page 167 of the Argument it appears that as far back as 1863.

The taking of seal, in whatever country they have been found, has been in an especial manner the subject of legislative and governmental regulation in the open sea. And in such actions Great Britain and Canada have been conspicuous.

By an act of the British Parliament passed in 1863, the colony of New Zealand was made co-extensive with the area of land and sea bounded by the following parallels of latitude and longitude, viz., 33° N., 53° S.; 162° E., 115° W. The south-eastern corner of this parallelogram is situated in the Pacific Ocean over 700 miles from the coast of New Zealand (26 and 27 Vict., ch. 23, sec. 2).

In 1873 the legislature of New Zealand passed an act to protect the seal fisheries of the colony, which provides :

(1) For the establishment of an annual close season for seals, to last from October 1 to June 1.

Now here let me be permitted to say I do not care what the legislation is, if there be any. If they can establish a close season for one week, they can for one year; it is the assertion of dominion that is important to consider. It is the claim of title that we want to get at, not the very mild, gentle measures that may be adopted. Perhaps they are entirely insufficient and more radical ones ought to be selected; but if they claim the right to establish a close season, they must also, by implication, insist upon, and claim, the right to enforce that close season. How are they to enforce it except by force? Not only did the Government of New Zealand do this, but it delegated its authority in these words :

(2) That the governor of New Zealand might, by orders in council, extend or vary this close season *as to the whole colony or any part thereof*, for three years or less, and before the expiration of such assigned period extend the close season for another three years.

If that be proper and correct, if Great Britain has a right to go over a dominion or domain of water extending some 700 miles, then by what principle may we not adopt those measures, and ask for the adoption of those measures which are absolutely necessary to the object in view?

The President. — Do you believe that law was ever applicable, or applied in fact to foreigners, and accepted by them?

Mr Coudert. — I intended to say a word upon that, and I will say it now if it is the preference of the learned President.

In the argument of Great Britain it is stated : We have made certain statutes, but they only apply to our own citizens — that is to say, take the Irish oysters or the New Zealand seals, I, whose fortune it is to be born and bred and to owe allegiance to the flag of the United States, may take a ship, may man it, may go there and plunder the oyster beds and destroy them; whereas an unfortunate citizen of Great Britain who started at the same time as me, is captured by a Revenue Cutter and very properly sent to gaol. Now that every possible sort of privilege and immunity should be granted to the United States, I highly prize and desire, but in spite of law arguments emanating from the highest source, (and the highest source is before us), I doubt if that would be the result; and if I had any client who was ready to embark his capital in the plundering of these oyster beds or the slaughter of the new Zealand seals on the theory that he had an advantage over the British subject because he was an American, I would advise him to stay at home and enter into some more reputable business — I do not believe that he would obtain immunity. I concede that the proposition is correct as stated in the abstract — that penal laws outside the territory, do not apply to any but citizens, as a general proposition. I do not concede, even for the argument, that in the case of the Behring Sea the statutes of the United States do not apply to every ship upon that sea whatever its nationality. But that, I have eliminated from my argument, and I concede as a general proposition, that a penal law in such general language as to every person does not apply unless a crime is committed, within the jurisdiction, to a foreign ci-

tizen. Even that is not universally the case. I do not know how it is in other continental nations, but I know for instance under the old laws of Prussia, and to-day, of Germany, the arm of the law will reach a citizen who commits an offence even in a foreign jurisdiction. He has not offended the law of Prussia, he has offended the law of another nation to which he is answerable, and yet the arm of the law extends and grasps him where it may; and when we are told, as we are told, in the brief of the learned Counsel, that these statutes do not apply to citizens of other nations, I would like to ask whether they mean by that, that no punishment would be inflicted, no confiscation put in force, and no repressive measures set into operation, if a foreign ship should accompany the ship moved and owned by citizens?

The President. — Perhaps we shall hear a little more explanation about that from the other side in due time.

(The Tribunal then adjourned for a short time.)

Mr Coudert. — When the hour of recess arrived I was calling the attention of the High Tribunal to the various laws which had been cited in Mr Phelps's argument to show what jurisdiction great nations had assumed, and properly assumed, to protect their property rights or to protect their industry, and a number were cited. I noted among others the laws of New Zealand. It is but fair to say that our learned friends on the other side have taken us to task upon that, and have made such an explanation of the laws that have been cited in connection with the facts — the geographical facts — that it is very possible that the illustration may not have been as valuable a one for my side as I supposed, and, therefore, I prefer not to rest upon that. Other illustrations are very strong and sufficiently prove the position that I have endeavoured to take, and to make more clear, namely, that all nations have found it necessary, that had marine traders connected with their property in territorial jurisdiction, to pass laws, make regulations, and adopt defensive measures which were necessary to the preservation of their interests. That is all I cited these cases for.

Now passing from the case of New Zealand we go to Newfoundland and we find the laws of Great Britain in connection with that were passed for the purpose of protecting seals and seal fisheries, and in connection with this I may say — and it may not be irrelevant to the consideration of the general subject — that all nations interested in the preservation of this animal have concluded that it was inexorably necessary that some kind of legal protection should be thrown round them, and some power exercised in their behalf under the penalty of absolute destruction. And therefore it is that you will find that all these nations that have seals, whether Great Britain, or Chili, or any of the South American nations, have all passed laws for the purpose.

It is unnecessary to add that the mere passage of a law is an assumption of right — an exercise of jurisdiction — and it makes very little difference so far as the general principle is concerned whether that law be

applicable and may be extended to others than nationals. So far as the main proposition is concerned, of the assumption of a right, if France passes certain laws to protect certain fisheries and if France confines that with an idea, real or mistaken, that it may not go beyond a prohibition to its own citizens — if it pass that law, by the mere passage of that law it exercises a jurisdiction and asserts a right because the laws of civilized nations are not made merely to harass their own citizens, the theory is protection to citizens in exchange for service, but what kind of law would that be which France or Great Britain would pass to protect the seal, or the oyster or the coral, which would be directed only against its nationals because it had no right to touch any other but those?

Of course they would be worse than nugatory, they would be worse than futile. They would be arbitrary and cruel. No nation understands that better than Great Britain. No nation has ever gone further, — I may say that perhaps no nation has ever gone so far as Great Britain in the assertion of the right to protect all round the globe (for its possessions extend all round the globe) the man who owes allegiance to her flag and obedience to her law. Other nations may have found that she pushed these pretensions and claims perhaps to an extravagant extent; but to her credit, be it said, that the British citizen was just as sure of protection from outrage by foreign Governments as the citizen of Rome when he could say “ I am a Roman citizen,” and, when he had said that, the hand of the torturer was stopped and the arm of the persecutor was paralysed. So with Great Britain all over and at all times. She has had one rule, that there was no nation on the globe great enough to oppress her citizens. Are we to be told now, and is it seriously to be argued that Great Britain passes laws oppressive, repressive and cruel which are to apply only to her citizens, and leave the rest of the world to perpetrate the wrong which she is trying to suppress? Yet that is the argument, if our learned and distinguished friends on the other side are right.

They tell us, and they repeat it in this argument, for instance, taking Canada, in their argument on page 43 :

“ The Fisheries Act,” they say, “ prohibits the killing of whales, seals, or porpoises with explosive instruments, and during sealfishing time from disturbing or injuring any sedentary seal fishery or from frightening the shoals of seals coming into such fishery ”.

Just what we are trying to do, to prevent the destruction of the shoals that are coming to our land.

“ The United States’ statement in respect of this Statute is that it prohibits all persons without prescribing any marine limit; and the inference drawn is that it applies to all persons on the high seas, including foreigners.

Now I need not pursue this. There are a number of other cases cited by way of illustration, and the distinction is made in this case and in the case of Chili, Japan, Panama and other nations, that these only apply to

nationals and not to foreigners. I do not believe, may it please you, Mr President and the other members of this Tribunal, that our learned friends would go to the extent of saying that anything which is forbidden a British subject is permissible to a Frenchman or an Italian, and I shall not be satisfied that that is their view of the case until they have stated it. I will not believe that two ships may go to any of these fisheries and one ship be arrested because it is a British ship, arrested by a British revenue cutter or man-of-war, and that the other will be able to go on and perform its work with impunity. I do not deny that as a general proposition penal statutes of this kind cannot operate outside the territory except as against nationals, but I do deny that that consideration gives impunity to the foreigner. I deny that if these two ships should go, the foreigner would be excepted, that he would simply be told that he may go on with his work, because there is no power to prevent him; and having received the assurances of distinguished regard from the courteous commander of the man-of-war, all the rigours of the law would be reserved for the British citizen.

That is directly the converse of the action of Great Britain in all cases, I take it that the rule is this, that while the statute itself would be inoperative, perhaps, as a statute outside the jurisdictional limits, against an alien and foreigner, the rule of self-defence steps in, and under a changed name and a different theory the wrong is prevented, and that the Frenchman, or the Italian, or the German, would find that his fate was not improved except that he would be stopped on general principles of defence, whereas the other would be simply told, there is a statute passed by your own nation, you are subject to the penalties which it affixes. If so, we are disputing about words. It must be so, because it is impossible that Great Britain should be willing to say to the whole world: "You have an advantage over our people, and all you have to do, when you invade our fisheries or our schools of seal, is to produce the opinion of distinguished counsel, backed up by decisions of the English Courts, that English statutes do not apply to any but nationals, and the property is at your service". That is impossible. Therefore, I say that that is merely a discussion of words. If the statute (just as our statute passed to protect our seals in what we consider our own waters) is a reasonable one, under the circumstances, that may be adopted by the United States, or a similar statute adopted, by Great Britain or any other nation as the measure of repression for the wrong which it is intended to prevent and if our friends say the statute does not apply, who says it does? — do you care whether it does or not — do you mean that foreign nations have a license to plunder your oyster beds or slaughter your seals, when that performance is interdicted to nationals?

What sort of legislation — what sort of a nation would it be, a proud, enlightened, aggressive nation that has never suffered a wrong to one of its nationals to go unredressed — are you not inevitably reminded, if such a theory is broached, of Shakespeare's Bottom, who invented a new

animal, a lion who would “ roar you gently as any sucking dove ”. No, Sir! Great Britain has never, and I hope the United States will follow her example, discriminated against her citizens, but she has always exalted the position of a British citizen, just as high as human power could do it.

So that in the abstract I am not disposed to quarrel with my distinguished friends about their views upon this. We will concede that their propositions of law, as considered abstractedly from the subject, are sound and we cannot legislate for foreigners outside of our jurisdiction, and we think that they will be compelled to admit that even if that be so, or claiming as they do that it is so, the right of self defence is not imperilled, impaired, or diminished.

It is not based upon the fact that the oyster is on the ground; or that the coral is on the ground. It is based upon the fact that it is an industry of the nation legitimately belonging to its creator and born to yield its fruits to those who have made fruits possible by industry, by care, by protection. How is the freedom of the sea saved (if it is invaded by our contentions), because the oysters live upon the bottom of the sea and never frequent the shore? In order to reach them, must you not go upon the sea? Must you not go below the sea? Must you not protect the sea? Is not the surface of the sea the space that you must guard in order to guard the property beneath. It is true there is the difference that they never frequent the land. There is this difference in our favour, because, to that extent, it is a land animal (I mean the seal is) and, to the extent that I have stated, it is a domestic animal.

I hope that this discussion has not wearied the Court or been entirely without value if it has shewn, what I take to be the fact, that we do not really differ upon this question, but that, upon the substance, Great Britain and the United States are agreed; and France would be agreed, for her interests are the same and her conduct identical, — that any national industry, even upon the sea, is to be protected, and that the right of self-defence may properly, fairly and legitimately be invoked whenever that industry is attacked. There are only two conditions attached to that; first, is it necessary to use measures of self-defence? And, in the second place, are they reasonable? If both those questions are answered in the affirmative, then the executive act which puts resistance in motion and which vindicates national right is complete, is justified and is law. Because it is law that we want. Law in its best sense, in its highest sense, in its most moral sense; the law that would be expected not from a Statutory Tribunal, not, the law that would be expected from one nation or the other, confined within narrow limitations which sometimes strangle the right; but from a Tribunal formed for the very purpose of expanding, enlarging and recognizing the beauties and greatness of international law. Now, the legal principles (and, if we can agree upon legal principles, a point, it seems to me, is gained) of our friends on the other side are stated at page 55.

That by the universal usage of nations, the laws of any State have no extra-territorial application to foreigners, even if they have such application to subjects.

With that, subject to the limitation that I have tried to make clear, I can find no fault.

That Great Britain has incorporated this principle into her own law by a long-established usage, and a series of decisions of her Courts; and that the law of the United States is identical.

With that I find no fault.

That the British Colonies have no power to legislate for foreigners beyond the colonial limits.

That international law has recognized the right to acquire certain portions of the waters of the sea and the soil under the sea in bays, and in waters between islands and the mainland.

That, in its terms, I should not be willing to recognize, because it recognizes the symptom and not the cause. International law has recognized the right of Great Britain and other Nations to certain Fisheries, to certain properties, not because it happens to be soil under the sea, but because, as I endeavoured to argue to the satisfaction of the Tribunal, it was the protection of an industry.

That the analogy attempted to be traced by the United States between the claims to protect seals in Behring Sea, and the principles applicable to coral-reefs and pearl-beds, is unwarranted.

The only difference is that the case of the seals is so much stronger, — stronger for the reason that I have given, that it is not necessary, in order to assert our jurisdiction and to handle our property, that we should dive down to the bottom of the sea. These animals come of their own volition, guided by their own instincts and preserved by that instinct from destruction. They come upon our soil; they seek it; they choose it. They live there, and breed there; and certainly, during the time that they are there, they are under our protection and in our possession.

And, finally, that there is no complete or even partial consent of nations to any such pretension as to property in, and protection of seals as set up by the United States.

Undoubtedly that is true. There is no such complete admission of our rights so long as a powerful nation like Great Britain denies them. Of course that is so, for if Great Britain accepted our views of the situation we would not have the honor to be here before this Tribunal to day. If the United States has a right of property either in the seals outside the territorial line or of self defence in respect of their admitted interest in it, no question is submitted by the Treaty as to how that right is to be exercised and enforced. It is to be presumed the United States are able to enforce that right. It is to be presumed that no nation would be willing to resist, and it is sufficient that this Tribunal should recognize that right in order that all the favourable results should follow from that decision, namely, that other nations should abstain from disputing that which is

assigned to us. It might be of course that the United States would undertake in an excessive or in an improper way to assert and exercise and enforce its rights but that would apply to any other right. There is no right which may not be asserted in an offensive way. There is no claim, however just which may not be enforced in such a manner as to justify the resistance and resentment of other nations. Of course as to that the United States must take their chance. They may be trusted I think to enforce those rights in a just and reasonable manner.

I have now, if the Court pleases, said all that I deem it necessary to say upon that subject, and I will proceed to a matter more directly connected with the facts in the case. I am quite confident that every Judge on the Bench and perhaps every Jurist on this Bench has recognized that one of the great difficulties in this case is due to the absence of what we call pleadings—the absence of issues. I cannot but believe that if this case had been brought into Court in a manner common to both nations in such a way that issues would have been framed, very little dispute of fact would have arisen between our distinguished friends and ourselves. This absence of pleadings and therefore of issues, have made a confusion in the case which it is very difficult to get rid of. To decide what is the the question in a controversy has been a difficulty from the time of Bacon and a good deal before him, but he said, to ascertain the true question was one half of the battle.

Now the idea of pleadings, whether in Great Britain, the United States or France, or any other country, is to have an assertion of right made on the one side with a denial, if there be one, on the other side — in other words, to present in the most succinct and true manner to the Court the varying contentions of the different parties. Every lawyer has found not only the facility which resulted from this, but very often the inconvenience, and there are Courts and very great Courts, which have sometimes sent Counsel baffled and discomfited away, because they were talking outside of the pleadings or had not raised in the pleas those questions they had chosen to discuss. There is no such difficulty here; we can discuss everything; we can discuss the nature of the seal, the habits of the seal, the life of the seal, the death of the seal, and we can discuss every possible subject, because we do not know what is conceded or what denied by the other side.

In fact, it will be found that we do not agree as to what is the real issue between the parties to the controversy, and, in fact, except that Great Britain has denied the right of the United States to exercise dominion, or jurisdiction, or sovereignty, as you please to call it, over the Behring Sea, it is not easy to say what point of contention there is between these two great nations. A law-suit has, generally, an objective point, a result to be attained, one desire or an other, but here we both want the same thing. We both want to protect the seal, and we both agree that the race is dying out; and you may read this Treaty from the beginning to the end, and you may study it in every form : it always

comes back to this : these two nations want to find out how they may, without sacrifice of their rights on either side, preserve a race which is conceded to be valuable to mankind. Thus upon the principal point we agree, and, so far, it is simply a question of means, for this High Court of Arbitration to find how to preserve and protect them, thus satisfying, as far as the final result is concerned, both parties to this controversy. That result was almost attained by diplomacy. Mr. Phelps, the United States Minister in London, had stated his proposition clearly and strongly to the Government of Her Majesty, had been met in the fairest way, and a scheme had been agreed upon, which at that time would be as satisfactory no doubt to the Government of the United States as to that of Great Britain. I say "at that time", because that would not be satisfactory at the present day.

It is idle to deceive ourselves on either side as to one proposition, and that is that we have learnt much upon this subject that we did not know when the diplomatic correspondence was going on. Both parties supposed that a certain protected zone — a large one — or a close season, as proposed, I think it was by Lord Salisbury, would satisfactorily protect these animals.

Mr Phelps. — It was proposed by the United States Government and assented to by Lord Salisbury.

Mr Coudert. — Yes, proposed by the United States Government. Perhaps a close season might be satisfactory as a means of protection, but only on the ground stated by Mr Carter that it would have to be so effective as to amount to prohibition — a close season that would permit pelagic sealing cannot prevent pelagic slaughter. The very nature of the business, however carried on, is of such a character that they cannot discriminate, and if you start with that assumption which is one of common knowledge and which my associate has so eloquently brought into the case, that the only means to preserve the capital is to preserve the females — if you start with that, that is the end of pelagic industry so far as it deserves recognition or protection. The preservation of the seals and pelagic sealing cannot exist at the same time. And therefore if this scheme agreed upon was such a scheme as to permit pelagic sealing it was a faulty scheme. If it was such a scheme as to prohibit it, it was a good scheme in substance, but it would have been infinitely more satisfactory to take absolute prohibition.

Now we have reached the point, however, through the exertions of both nations and an unwillingness to adjust by diplomatic methods the differences between them when the matter was referred to Canada. Now in denouncing pelagic sealing and pelagic sealers, of course, this High Tribunal will understand that this is simply a denunciation of the business. It is denunciation that applies to two classes of men the Canadians and the Americans. How many of the Americans are engaged in this business in violation of their national law or Canadian ships I do not know, but as those ships come from Canadian ports and profess to sail

under the British flag, I will speak of that business simply as Canadian sealing and a Canadian industry, if it deserves that name. How is it that after this Agreement had been substantially made that the efforts protracted and zealous of both sides should have resulted in a miscarriage?

We have that in a letter which I desire to read, because it is very important and has not been read yet and I will save the Court perhaps the trouble of reading it hereafter; and, in connection with my remarks upon the facts, it may be valuable. It shows whence the opposition comes, and upon what the opposition was grounded; and perhaps it would not be possible to present the case of Canada in a stronger and clearer and better way than it is presented in this letter. I believe it is read now for the first time. It is found at page 213 of the Papers presented to the British Parliament, — the Appendix, Volume 3 to the British case; and this letter is dated Ottawa, July the 7th 1888. It is signed by Mr. George, E. Foster, Acting Minister of Marine and Fisheries. Of course, the statements emanating from such a source are to be taken with respect; and everything this gentleman can be supposed to have stated of his own knowledge must be taken as true. He was speaking, as he had a right and, indeed, had a duty to speak, in favour of his own people of what he conceived to be, no doubt, a legitimate industry and in resistance to measures which might, he presumed, be to the detriment, as you might suppose, of his own Nationals.

The undersigned has the honor to submit for the consideration of the Governor General in Council the following observations in respect to a despatch from Lord Knutsford to Lord Lansdowne, dated the 8th March, 1888, and enclosing a proposal from Mr Secretary Bayard for the establishment of a close season for seal fishing in and near Behring Sea, to extend from the 15th April to the 1st November of each year, and to be operative in the waters lying north of latitude 50° north, and between longitude 160° west, and, longitude 170° east from Greenwich.

The Court will see what a wide space that covered, and what a broad period of time.

Before entering on the discussion of this proposition, the Minister desires to call attention to a sentence in a letter from Lord Salisbury to Sir L. S. West, dated the 22nd February, 1888 and forming a part of the above mentioned despatch, in which Lord Salisbury says : — The United States Minister called today at the Foreign Office, and spoke to me about the question of the fur seals in Behring Sea. He said that the difficulties in regard to the seal fisheries in that sea were mainly connected with the question of the close time, and that no attempt had been made by the authorities of the United States to stop the fishing there of any vessels at the time when it was legitimate.

This clearly implies that Lord Salisbury had been led by the United States Minister to believe.....

This is a compliment to our brother Phelps, of which he ought to be well proud, if he could induce Lord Salisbury to believe anything that was not true or which he ought not to believe — then he is fully up to his reputation for exquisite diplomacy.

This clearly implies that Lord Salisbury had been led by the United States Minister to believe that there is a fixed close and open season for the killing of seals

in Behring Sea, which is common to all vessels of all nationalities, and that during the open season these may legitimately and without molestation pursue the business of catching seals.

The facts of the case appear to be that within the limits of the Territory of Alaska, which by the United States' contention includes the waters of Behring's Sea as far westward as a line drawn from a point in Bering's Straits south-west to the meridian of longitude 173° west, the killing of fur-bearing animals, amongst which the seal is included, is prohibited by law, that repeated warnings to this effect have been given by the United States, authorities, and that vessels both of Canada and the United States have within the past two years been seized and condemned for killing seals within these waters. It also appears that on the Islands of St-George and St-Paul, during the months of June, July, September, and October of each year, the United States' Government allows the slaughter of seals to the number of 100,000 by certain citizens of that country known as the Alaska commercial company, for which monopoly the United States' Government is paid a yearly revenue of more than 300,000 dollars.

The Tribunal will observe the use of this word "monopoly", which is repeated *ad nauseam* throughout the case. It appears, perhaps, for the first time officially here; but it has been adopted, and may possibly account for the feeling exhibited by the British Commissioners in their open and bitter antagonism to the killing as practised on the Pribilof Islands.

From the very nature of the case it must be a monopoly. It is evident that if safety and protection of seal can only be accomplished by killing on land, the only persons who can do the killing on land are the proprietors of the land.

Senator Morgan. — I suppose you mean a monopoly as to that herd — not as to the Japanese herd or Russian herd.

Mr Coudert. — Probably, because it is the only herd that is spoken of; and I call attention to that expression. It is a mischievous one; it is, in one sense, I think I may say without impropriety, perhaps an improper one. If it be a monopoly, it is simply *ex necessitate rei*. It cannot be otherwise than a monopoly. If you throw the business on the islands open, so that it is not a business, then that simply means raiding; and all parties agree that raiding means destruction. In fact, the assertion of the right to kill on the islands (which is the monopoly complained of), is simply, I may call it, a right to tax — it is a right to levy a tax. One of the experts, (to whose evidence I shall call attention) says with Gallic humour, sense, and justice that it is an *impôt sur les celibataires*. But it is not necessary for me to depart, swerve — or as Sir Charles Russell would call it — to « Shy », from my subject. I am simply speaking of this as a monopoly, and I say the power to tax is a power to slay; and I might better put it by quoting an expression which Mr Justice Harlan is familiar with — the power to tax is the power to destroy, because it is an expression used by your great chief justice; and it shews if we have the power to tax alone we have the power to conserve and the power to destroy. I object to the word monopoly, and that is the reason I stopped here to shew the Court that it was unjustly and unfairly used in view of the features of this case.

« At no season of the year, and to no other persons whatever, is it permitted to kill a single seal within what is claimed as the limits of the Territory of Alaska ».

That is true. We do not allow people to come on our islands and kill our seals except with our permission.

It is evident, therefore, that there is no part of the year when citizens of any country, with the sole exception of the Alaska Commercial Company, can legitimately kill seals within the limits named; and when Mr Phelps stated to Lord Salisbury that no attempt had been made by the authorities of the United States to stop the fishing there of any vessels at the time when it was legitimate, his statement should be read in conjunction with the fact that there is no period of the year when it is legitimate for any vessels to fish for seals in the waters of Alaska.

The proposal to fix a close time based by Mr Bayard upon the alleged necessity of immediate measures to prevent destruction of the seal fishery in Behring's Sea and the North Pacific Ocean.

Your Honours will see that even at that time — that is in July 1888 — the Canadians were well informed that killing of seals in the North Pacific Ocean, was one of the grievances of which the United States complain.

It is not clear from any information at present possessed that any pressing and absolute necessity exists for any such measures, so far as shown by the present condition of that fishery in the North Pacific.

May I not say that that is a very qualified denial and naturally a qualified denial coming from an honourable Official who can simply content himself not with denying that there is a pressing and absolute necessity, but simply that it is not clear from any information then possessed, that that pressing necessity existed. The fact is, that when the case was well understood and all the facts before the parties interested, it became absolutely clear that a pressing necessity existed — so pressing that both sides come to the *modus vivendi*, and agreed that their hand should be withdrawn from the sea, and that the herd should be allowed to continue and increase and multiply in peace.

From a Report made by the Special United States' Treasury Agent in Alaska dated the 31st July 1887, it appears.

(1) That none but young male seals are allowed to be killed on the Pribilof Islands, and of these only 100,000 annually.

(2) That a careful measurement of the breeding rookeries on St-Paul and St-George Islands showed 6,357,750 seals, exclusive of young males.

That seems to be a very close calculation. It is not " 751 ", or " 753 " — it is " 750 ". How that is arrived at, I do not know.

Sir Charles Russell. — He is your own official representative.

Mr Coudert. — No doubt. That is what he says. Well, they are all good guessers.

(3) That 90 per cent of the pups bred by these go into the water, leaving a mortality of but 10 per cent at the place of breeding.

(4) That fully one-half of the above 90 per cent of pups returned the following year as yearlings to the rookeries leaving thus a total mortality of 45 per cent. from various causes at sea.

It needs but a slight consideration of these figures to demonstrate that an addi-

tion of millions each year must be made to the surviving seal life in the North Pacific Ocean.

That is, it must be increasing enormously.

The Agent in his Report says : “ This vast number of animals, so valuable to the Government, are still on the increase. The condition of all the rookeries could not be better?

This was the condition of things, if this Report is to be trusted, in 1887.

Against the enormous yearly increase of seal life may be placed the average annual slaughter as given in the memorandum attached to Mr Bayard's letter, viz, 192 457 for the whole world, or for the seals near to Behring's sea as follows :

Pribilof Islands.	94 967
Commander Islands and Robben Reef.	41 893
Japan Islands.	4 000
Northwest coast of America...	<u>25 000</u>
Or a total of.	165 860

With an annual clear increase of millions, and an annual slaughter of less than 200 000 in the North Pacific Ocean, it surely cannot be contented that there is any necessity for such stringent and exclusive measures as the one proposed in order to preserve the seal fishery from threatened destruction. Not only would it appear that the present rate of catch could be permitted, and a continual increase of the total number of seals be assured, but it would seem that this annual take might be many times multiplied without serious fears of exhaustion so long as the present conditions of breeding on the Pribilof Islands are preserved.

I can ask for no better praise of the system on the Pribilof Islands than this from this gentleman — you may go on and take, and multiply the take, without serious fears of exhaustion so long as the present conditions of breeding on the Pribilof Islands are preserved.

The time proposed as close months deserves consideration, viz, from the 15th April to the 1st November. For all practical purposes, so far as Canadian sealers are concerned, it might as well read from the 1st January to the 31st December.

I beg that the Tribunal will notice this — that any reasonable curtailment — any curtailment that is not purely nominally a right to take seals, might as well be from the first day of the year until the last. In that, I entirely agree with the Commissioner. Abstinence is easier than moderation, Dr Johnson said, as far as drink was concerned; and abstinence is easier than moderation when it comes to this pelagic slaughter which holds out a glittering reward for the time without reference to the dreadful consequences in the future.

It is a well-known fact that seals do not begin to enter the Behring's Sea until the middle or end of May; they have practically all left those waters by the end of October. The establishment of the proposed close season, therefore, prohibits the taking of seals during the whole year. Even in that case, if it were proposed to make this close season operative for all on the Islands of St. Paul and St. George as well as in the waters of the Behring's Sea, it could at least be said that the close time would bear equally on all.

Sir Charles Russell. — He says; — “ Even in that case if it were pro-

posed to make this close season operative for all ” — he means operative on land as well as on the sea.

Mr Coudert. — It is :

Even in that case, if it were proposed to make this close season operative for all on the Islands of St. Paul and St. George as well as in the waters of the Behring Sea, it could at least be said that the close time would hear equally on all.

But the United States Government propose to allow seals to be killed by their own citizens on the rookeries, the only places where they haul out in Alaska, during June, July, September, and October, four of the months of the proposed close season. The result would be that while all others would be prevented from killing a seal in Behring Sea, the United States would possess a complete monopoly and the effect would be to render infinitely more valuable and maintain in perpetuity the seal fisheries of the North Pacific for the sole benefit of the United States.

Here, again, is this reproach on the monopoly, and here, and throughout this letter, and throughout most of the arguments in this case, the one great distinction is lost sight of which cannot be kept too closely in mind by the Tribunal — that no scheme has been suggested — that no scheme can be suggested by human ingenuity so far as failure in the past allows us to say so now, which will permit discrimination, and the advantage that the United States possess and which they alone possess so far as this industry in raising seals is concerned, is that they may discriminate. Now I know that it is stated by our friends — it is stated throughout the case — that females are sometimes killed. My brother Carter went into this subject with great elaboration and beauty of expression and illustration yesterday, and therefore I need not go into that. The question is whether any comparison is to be made between the killing of seals on land where discrimination is made, and the promiscuous slaughter that is made here.

Whoever heard of a raiser of sheep allowing his men to rush wildly in the flock with gaffs and spears and shot guns and rifles? Discrimination is the rule. The only historical instance I know of is one I am sure familiar to the President of the Tribunal, where a certain gentleman attacked a flock of sheep mounted upon his horse, clad in his armour, armed with his good sword, and slew them right and left. But then he was a lunatic, as you remember — at least, he said so himself when he died and he repented of these things, and said that whereas he had been out of his mind, then, as he was approaching the portals of death, he was sane again. That is the only instance which my researches have permitted me to find which can be of any use to the Counsel on the other side on that point.

It is to be noted that the area proposed by Mr Bayard to be effected by the close season virtually covers the whole portion of the Behring's Sea in which the exclusive right of sealing has, during 1886 and 1887, been practically maintained by the United States Government. To this is added a part of the North Pacific Ocean, north 50° of north latitude, and which commands the approach of the seals to the passes leading into Behring's Sea. By the adoption of this area and close season the United States would gain, by consent, what she has for two years held in defiance of international law and the protests of Great Britain and Canada.

Whether it is in defiance of international law is a question which the Tribunal may have something to say about; but certainly Mr Bayard did propose this as the only just and reasonable way of protecting the rights of the United States.

And while this area would be held closed to all operations except to those of her own sealers on the Pribylof Islands, the northwest coast of North America up to the 50 th parallel of north latitude and the sealing areas on the north-eastern coast of Asia would be open to her as before.

The device...

If successful, would feed and perpetuate the rookeries on St. Paul and St. George Islands...

That is true. That is precisely what we ask — that these rookeries, the only home and place of protection of these animals, should be perpetuated and fostered and taken care of and increased...

And add immensely to their value, while it cuts off at one blow the most valuable portion of the high seas from all participation by the sealers of all others nations.

It is to be borne in mind that Canada's interest in this industry is a vital and important one, that she has had a very large capital remuneratively employed in it, and that while by the proposed plan the other Powers chiefly interested have their compensations, Canada, has none. To her it would mean ruin, so far as the sealing industry is concerned.

Mr Bayard appeals to the Government of Great Britain on the grounds of the labour interested in preparing the seal-skins in London.

It appears in the Case that thousands of hands are employed in London in preparing these skins.

It is not necessary that the Alaska Commercial Company should do the sole catching of seals in order to retain this advantage to London labourers. The sealskins taken by Canadian sealers find their way to London to be dressed, just as surely as do those taken by the United States' Company. So long as the fishery is not exhausted, London will, other things being equal, retain the advantage she now possesses in this respect. But Mr Bayard must misapprehend the sense of justice of Her Majesty's Government, if he supposes that they would consent to an unjust deprivation of Canadian rights, because of the alleged prospect of perpetuating some small pecuniary advantage to a limited section of her subjects in London. Under this proposal Russia would lose nothing. Her vessels do not now pursue seals in that part of Behring's Sea ceded by her to the United States in 1867. Russia has valuable seal islands of her own: the Commander Islands in Behring's Sea, and Robben Reef in the Okhotsk Sea, on which there are valuable rookeries, and the Russian Government draws a considerable revenue there from, as they are under lease to this same Alaska Commercial Company. This part of Behring's Sea does not fall within the proposed closed area.

It has been already shown that the United States would gain largely by the establishment of this close period.

The President. — Is that the same Alaska Commercial Company that had control over the Russian fishery?

Mr Coudert. — Not the present lessees — not since the change in the lease; but at the time this gentleman was writing.

Sir Charles Russell. — It was the same at the time that letter was written.

The President. — They are separate now?

Mr Coudert. — Yes.

« From her rookeries on the Pribyloff Islands she draws now a yearly revenue of over 300 000 dollars. This would not only not be interfered with, but would be enormously increased by reason of the perpetual monopoly she would enjoy under the proposed arrangement.

If the prosperity of one country is an argument to be used by another country in defence of malpractice, of course this is a very strong argument. It would be profitable to us to continue that industry. It would be profitable to the world if we should be allowed to continue it. All we can say is, it is either this monopoly or destruction.

But while this is true, as to Russia and the United States, Canada would lose the employment of a lucrative right long possessed, and this loss would be fatal to her prosecution of the seal industry, and would be unrelieved by a single compensation.

It is manifest from a perusal of Mr. Bayard's letter, that the proposition is to prevent the killing of seals during the close time by any process whatever within the area set apart, except, of course, upon the Pribyloff Islands.

Forgetting that there is a close season on the Pribiloff Islands from the 1st of January to the 31st of December. The close season is intended to prevent a certain thing, that is the killing of females; and it is not allowed on one single day in the year to kill them on the Pribilof Islands. Therefore, so far as this case is concerned, so far as the evils to be remedied are concerned, so far as the remedies to apply are concerned, we may say that there is a close season the whole year round on Pribilof Islands, and that is the fact that these gentlemen will not understand.

Experienced sealers aver that by the present methods of hunting with gun and spear not more than one in ten of the seals struck is lost, and it is not believed that these methods are so destructive as Mr Bayard alleges.

That is, they wound ten per cent and lose them. We will undertake to show that the loss is enormously more than that, that it is a most severe drain upon the herds, without benefit to anybody; that the animals are wounded and lost constantly, 25 and 30 per cent : but that I am anticipating in my statement.

The method of taking seals by means of the net is not a destructive method, and yet it is proposed to prohibit this as well.

I am glad to have a Minister say that the use of the net is not a destructive method. That is one of the few methods that are prohibited by the British Commissioners, and probably for the reason that it is not destructive. The only methods that they allow are the most destructive, as the court will see. Put the animals out of their pain as soon as you can :

It appears, therefore, that what Mr. Bayard intends is to entirely prevent the killing of seals within the area proposed by any methods or by any person except by the methods employed upon the Pribilof Islands and by the citizens of the

United States, who may, for the time being, enjoy the monopoly of taking seals thereon. Against this unjust and unnecessary interference with, or rather prohibition of, rights so long enjoyed to a lawful and remunerative occupation upon the high seas, the Undersigned begs to enter his most earnest protest.

And that this was effective, that this was a most effective protest

The President. — Mr Coudert, I would like to ask you whether we are to hear an explanation from your side as to this taking of the seals by nets. Will you come to that? Is it a point of your argument? We have not heard yet about it, but we wish to hear about it.

Mr Coudert. — I would like to answer almost any other question of fact that the President of the Tribunal might put to me; but really I never saw anything about taking seals by nets that was worth considering, except that the British Commissioners say, "You ought not to take by nets".

This gentleman says it is not destructive. I do not understand that anybody denies that. I understand there is a valuable intimation in some affidavit that at one time or another they were used in the Aleutian Islands or in the straits.

The President. — Will the British Government's side offer us any explanation as to the sealing with nets?

Sir Charles Russell. — Yes, in due course.

The President. — If we hear it at any time, it will be sufficient, of course.

Mr Coudert. — I think it is not an element in this case. I think the other side will agree with me that it is not an element in the case.

The President. — The point is why it is not an element.

Mr Justice Harlan. — It might become an element when we come to Regulations, as to whether that mode of attacking the seals is to be prohibited or not.

Mr Coudert. — That is a question upon which I do not think any of the counsel are in a position to help the Court.

Mr Justice Harlan. — My reading of the case is that it is admitted on all sides that the taking of seals by nets is injurious; but what is that mode, I have not gathered from the case.

Lord Hannen. — *Primâ facie* it would seem to me to present one difficulty — the difficulty of discriminating between males and females.

Mr Coudert. — I do not know, your Lordship, how it would discriminate. All the fish would come into that net, if it was a good net.

Lord Hannen. — We shall hear explanation of how the net is used farther on.

Mr Coudert. — That does not appear in the case. Nets are not used, I think I may state that without contradiction.

The President. — They might be.

Mr Justice Harlan. — Nets are not used?

Mr Coudert. — No sir. Practically there is no such thing as taking by nets. It does not exist. A little importance is given to it by the

British Commissioners in their report. While I regret, Mr President, that I am not able to give you information upon this.

The President. — Perhaps it will come in time.

Mr Coudert. — I doubt it, Sir. I doubt it; because the sources of information to which I have applied with some diligence are all in the same papers that my learned friends must consult, and from which they must also draw their knowledge; and I think I may say that nets have never been a practical factor in this seal fishery; that there is an affidavit somewhere in the papers by which it appears that some man, I think, had heard of the employment of nets in the Aleutian channels, or the Aleutian Islands, by which a few pups were caught. I do not think there is any evidence — I am subject to correction by my learned friend if I am wrong — that seals were caught by nets.

The President. — Those would be fixed nets on shore perhaps?

Mr Coudert. — They would cover the mouth of a bay, and catch the seals as they passed.

The President. — Stretching from one shore to another?

Mr Coudert. — From one shore to another.

The President. — Not on the high seas. That would be impossible?

Mr Coudert. — That would be impossible, of course. As I say, the only importance attached to taking seals by nets is that the British Commissioners recommend that that be interdicted. I do not think anyone objects to the interdiction by nets. The Canadian sealers do not use them, certainly. We do not use them on the Islands; and I do not know that any body ever has used them. I may say here, although this is somewhat anticipating, that from the British Commissioners reports, it appears that there are two methods of destruction that have become obsolete, or have never been used. The rifle has become obsolete. The net has never, practically, been used. Those two methods of destruction they recommend should be interdicted. The shotgun has displaced the rifle. The shotgun is the most deadly weapon. This destruction has grown from evolution. The original germ or protoplasm was the Indian sealer with a hungry belly and a spear as his only capital, using the one to fill the other through the medium of the seal. That was the protoplasm. Then that grew up. Even the ordinary musket would hardly be available for that purpose. You must bear in mind that these seas are agitated, that the seal, the sleeping mother, even when she sleeps, *confiding in the humanity of man*, because the instinct of the mother tells her to confide, may escape a musket because of this motion; and when the pelagic sealer has missed, he has to go through the old-fashioned process which the older members of the Court are familiar with of loading through the muzzle, and missing fire half the time.

But all that has disappeared with the improvement in fire-arms. First came the rifle, which carried an enormous distance, and with a deadly ball. That was better, and that was used. Then came the shot-gun, with the buckshot scattering, of course, enormously, wounding and mai-

ming very often, but very often hitting; and in many cases the seal is caught. So that the shot-gun is now, I think I may say, the only method that is used by the pelagic sealer. That is the last in evolution.

The President. — Do the shot-guns that are used now reach so far as the rifle?

Mr Coudert. — They do not reach quite so far as the rifle. Of course the rifle, with the ball, will reach, theoretically, much farther than the shotgun; but for practical purposes the shotgun will reach just as far as the rifle. That is to say, if you try to shoot a seal at the extreme distance to which a rifle would carry, that would be a very poor advantage indeed, unless you were a very fine marksman, you would miss the seal. In order to kill the seal, you have to come within a certain distance; and these pelagic sealers will come as near to the seal as it is possible to come without frightening it away. For that purpose the shotgun answers much better than the rifle.

Senator Morgan. — I will suggest to you just there, Mr. Coudert that it would be entirely useless to shoot a seal at the distance of 100 yards because it would sink before you could get to it. It would be lost before you could get to it.

Mr. Coudert. — Yes sir; that is one of the ways in which nature punishes the pelagic sealer. It is insufficient; but that is one of the methods. When the poor animal is shot dead he revenges himself by dropping like a shot. That is the only revenge that he has.

So that you will see that what you would want to interdict would be shooting them with a shot gun; and if the process had been reversed, and if the champions of pelagic sealing had interdicted the shot gun and permitted the net, we would care very little if every other means were taken away from these men and every other opportunity to destroy these animals. You will find that it is the shot-gun. You will find how deadly the shot-gun is and yet how often the seals are lost; and that is one of the points to which I shall have to call the attention of the Tribunal, namely the enormous waste not only by killing three animals when you kill one, but even of losing that one, which constantly happens; and I will show you that it must continue to happen because skill does not grow in that business. In every other business constant practice engenders skill; but the trades unions protect the unskillful man against unjust discrimination in favor of the sharp-shooter. It is interdicted by the rules to take more than a certain proportion of skillful men; and when a man by dint of shooting, wounding and driving away seals has attained a tolerable skill he may be retained or he may not be retained, but the proportion of at least one half must be the men who miss twenty-five per cent of their shots.

The President. — Do you mean to say that this industry of sealing on the coast or on the high seas, is carried on by men who are engaged by the trades-unions?

Mr Coudert. — Yes sir; I have got it here. It is very curious.

The President. — And submitted to such rules as you state?

Mr Coudert. — Yes, sir.

The President. — I thought it was left to all.

Mr Coudert. — Here is an extract from the agreement by the Sealers Association. I am pleased at the question asked about the nets. It has permitted me to anticipate somewhat, and to produce this. I am reading, as I say, for the benefit of my friends on the other side, from the Case of the United States, at the bottom of page 192.

With the permission of the Tribunal, I will read the remarks just before the quotation.

After stating how many seals were wounded and lost and the proportion is enormous — our case says:

“ Not only has the increase in the number of white hunters in the last few years made the seals much wilder than before firearms were used, but it has also added largely to the number of inexperienced hunters engaged in sealing. It is only necessary, in order to show how much the unskillful outnumber the skillful hunters, to refer to the agreement entered into by the members of the Sealers' Association of Victoria, British Columbia, for the season of 1891; the portion of the agreement referring to this matter is as follows: “ We also bind ourselves not to take more than three experienced hunters in the sealing business on each vessel represented by us, said hunters to be engaged at the scale or lay adopted by this Association, as hereinbefore particularly described; and we also agree that all hunters required in excess of the three hunters above mentioned for each vessel shall be new men at the business of seal hunting, and shall be engaged at the same scale or lay hereinbefore mentioned, and this clause shall apply to all vessels owned or controlled by the members of this Association, whether clearing from the port of Victoria or other ports in Canada or the United States, or any port where any vessel owned or controlled by any member of this Association may be fitting out for sealing on this coast.

The Case adds practically just what I have staded :

The number of hunters thus allowed to a vessel is, therefore, about one half the number of those actually taken on a vessel employing white hunters.

Lord Hannen. — May I ask you : What is it you are citing this to establish? What is your proposition?

Mr Coudert. — I am talking of the enormous destruction that results from pelagic sealing in the manner in which it is now conducted.

Lord Hannen. — Does that depend upon whether these rules of trades-unions are observed or not?

Mr Coudert. — It depends upon the skill of the huntsmen, to a great degree. Your honor will find when I come to read the evidence, that a discrimination is made by the witnesses. Some of them say : “ Green hands miss 25 per cent one or two witnesses say that they fire away all day and do not get any; but others say a skillful man will not lose more than four or five per cent or six per cent or seven per cent of those which he kills. Now, it is important, therefore, in that connection, as explaining what green hands are, what experienced hands are, what the expectation may be of improving in this destruction, and as an explanation for destruction

in the past; to show that the means of perfecting themselves in this business are shut off by regulations, which are stronger and more powerful, very often, than the laws of the land.

Mr Justice Harlan. — What did this Association mean by providing for the employment of inexperienced hunters?

Mr Coudert. — It would be this. I suppose that in all these associations the great rule is equality — “liberty, equality and fraternity”; and they would not be equal if one had had five or six years experience in slaughtering the seals and the other had none. Therefore there is the liberty to go into the business, the equality by not permitting the experienced men to have an advantage, and the brotherhood of the trades association, which clasps them all in its arms, and gives them all an equal chance.

The President. — It seems to be international; it provides for American ports as well as for Canadian ports.

Mr Coudert. — Yes. Oh, we are brothers. There is only an imaginary line between Sir John’s country and mine, and we often forget it in our affection for those neighbours.

Senator Morgan. — Where is the head of this association at present?

Mr Coudert. — In Victoria; and this is taken, as you will see, from the British Blue Book.

Sir Charles Russell. — I think it is non-existent now.

Mr Coudert. — I think I have failed to answer the question of the learned President of the Tribunal as to nets; but I have given him in return some information which I possess on the subject of rifles and shot guns.

The President. — I am sure we have found it very interesting.

Mr Coudert. — I stated to the learned Tribunal how some of these were lost. I will give you some statistics upon that, with a belief that the court is interested in knowing precisely the nature, the extent and the destructive agency of this pelagic sealing. Upon this subject — although it is branching off somewhat it is also germane — I will read from the case, a few lines only, from page 194 :

Besides those lost by wounding, in many cases, others killed outright are not taken, because the specific gravity of the seal being greater than water it sinks before it can be secured. In order to save as many of the sinking seals as is possible, each boat carries a gaff, with a handle from four to six feet long, with which to grapple the carcass, if the point where it sank can be reached in time to do so. Of course in securing a sinking seals much depends on the distance from which the seal was shot, the condition of the water, whether rough or smooth, and whether or not darkened by the blood of the animal, as also the skill of the hunter in marking with his eye the place where the seal sank. It can, therefore, be seen that the range of possible and probable loss in case the seal is killed outright is certainly large, though not so great as when the seal is wounded.

As the Case will show, and the testimony upon it is very explicit, the seals are lost when they are killed and they are lost when they are wounded — not so many when they are killed, perhaps, because in many

instances a prompt boatman with a quick gaff will spear the animal as it is sinking and recover it ; but that a great many are lost in that way is very apparent ; and also when they are wounded.

Now, how many are lost in consequence of wounds, no human being can tell. We have some very interesting speculation upon that subject. Some of the sealers express it as their opinion as experts that they do not think a great many die by their wounds. How they get at that, how they can without an examination measure the gravity of the wounds and the likelihood that they will result in death does not appear in the case ; but you will find a number of the witnesses who state, — and so far as we know from hearing their depositions and without seeing the men, they state with entire seriousness, and perhaps with the intent to tell the truth — that they do not believe that these seals die. The seals must be very tough if a great proportion of them do not die.

The Tribunal at this point adjourned until Thursday, May 4, 1873 at 11, 30 a. m.

SEVENTEENTH DAY. MAY 4TH, 1893.

The President. — If you are ready to proceed, Mr Coudert, we are ready to hear you.

Mr Coudert. — I had the honour to call the attention of the Tribunal yesterday, before the adjournment, to the difficulty which any lawyer must find in making clear the issues in the case. If we had any pleadings to guide us, we might on both sides bring down all the points and facts to one or two or a few questions; but when there are many averments on the one side and only vague admissions or denials on the other, we are necessarily put to the necessity, where material facts are involved, of going over the whole case.

This must be my apology if, in discussing these matters, I should take time and occupy the attention of the Court in discussing questions which I may find hereafter not to be questions in the case. Indeed from a statement of our distinguished adversary, Sir Charles Russell, I am inclined to believe that most of the propositions of fact, which have been laid down by my Associate Mr Carter and which I mean to sustain by proof, will be admitted by him so far as they relate to seal-life; but, upon a vague statement of that kind which I may not perfectly apprehend the meaning and extent of, I cannot, of course, forbear going somewhat extensively into the proofs.

Not only is there an absence of issues to guide the counsel and the Court, but there is a mis-statement (I use it of course in the most courteous sense) a misapprehension on the part of the counsel on the other side of the issues in the case — at least if they do not misapprehend them we do. The lawyers, who drew this being lawyers, and understanding how important it was that we should come before the Court with issues, that is with allegations of an affirmative character on the one side and denial on the other, have stated the issues as they understood them to exist and they say that the issues are clear. This is on page 5 of the argument of the British Counsel :

Was the Government legally justified in seizing British vessels engaged in pelagic sealing in Behring Sea outside territorial waters?

Now I make bold to say that there is no such issue in this case. Nay I go further and say that we are forbidden to discuss, and this high Court is not authorized to decide, the issue thus stated in the argument of the Counsel. Both nations reserved that question, or those questions to themselves and although I am free to confess that the decision of this

high Tribunal, on the questions of fact, may have, and, no doubt, will have a most important bearing on any diplomatic adjustment hereafter to be made, yet all those matters which relate to liability are expressly excluded by the terms of the Treaty; and, therefore, I shall not undertake to discuss the question which our friends on the other side say is the only question in the case. I have thought it necessary to state this at the outset, because if our friends on the other side are correct in their statement of what the issues are, then we are entirely wrong, and our discussion should follow an entirely different turn. Whether the vessels were properly arrested or not, whether the decision of our Court in Alaska when the *res* was before it is final or not, whether our Government will consent to abandon the effects of that decision, whether the decision made by this Tribunal will necessarily decide those issues one way or the other, for one party or the other — as to that I express no opinion, for I have no right to obtrude any upon a Court which is not to deal with the questions involved.

Now, I propose, with the permission of the Court, to enter upon a somewhat detailed examination of the facts. Both my learned friends and myself have stated to the Court certain propositions of fact, and for the purposes of the argument we should naturally expect that they will be admitted as facts with the understanding, of course, that they are to be supported by reference in the Case to the testimony which supports these propositions. There are many other propositions which are admitted, some of which are very imperfectly denied, and as to a few of which it would appear that my learned friends have taken issue with us. Some such as these that I am now going to read from are admitted in the Case. It is admitted (and it is a very important admission bearing on the nature of the fur-seal) that the pup is invariably born on land. Our Case states it as briefly and tersely and compactly as it is possible to do it, and every one of the propositions I am now going to read, will, I believe, be admitted to be true on the other side; and it will save time for me to read this, for I am unable to state it more succinctly, I am reading from page 98 of our Case, the Case of the United States.

The pup is born on the breeding grounds during the months of June or July. Its birth usually occurs within a day or two after the mother seal arrives on the islands, and often within a few hours. A young seal at birth weighs from six to eight pounds, its head being abnormally large for the size of its body; it is almost black in colour, being covered with a short hair, which changes to a silver-gray colour after the pup learns to swim. These two grades of pups are distinguished by the names "black pups" and "gray pups". The coat of hair is its only covering, the under-coat of fur not being found on the new-born seal".

That proposition, I take it, is undisputed.

It is also undisputed that there is only one pup born at a birth. It is stated that there may be exceptional instances, phenomenal instances, which prove nothing except that there are exceptions to every rule, and that sometimes two are born at a birth. But that may be dismissed

from the consideration of the case; and it will be found that there is no dispute between the two sides as to the fact that only one pup is born at a birth. A curious phenomenon (and it is a phenomenon, if the view of the British Commissioners as to the nature of this animal is true) is that this aquatic or marine or pelagic animal, if born at sea, will drown. Birth in its native element, if I may call the native element the element in which it is never born, — birth, at all events, at sea is instantly punished by Nature's law with death; and a curious illustration of this is shewn by the fact that during one year when the winter was extremely severe and lasted into the season when the Islands are generally free in their approaches from ice, a number of the mothers were unable to reach shore in time, the pups were born at sea, and every one of them perished. The importance of this consideration, when you come to examine into the nature of the seal, cannot be overstated.

Some details as to this important matter of fact will be found in the Case at page 99; and I will read a few lines with the evidence which supports the statement.

For the first six or eight weeks of its life the pup is confined entirely to the breeding grounds, being unable to swim. Mr Thomas F. Morgan, for nearly twenty years located on the Pribilof Islands as one of the agents of the lessees, states that he has often seen young pups washed off by the surf and drowned. Dr N. L. Hereford, for many years resident physician on the Pribilof Islands, relates that a pup being found which had lost its mother, was placed near the water's edge in order that it might swim to an adjoining rookery and perchance find its parent. Day after day he continues, this pup was watched, but it would not go near the water, and neither did its mother return. After several days or so, a new employe of that season only, and knowing nothing whatever of fur-seal life and habits, coming along that way and finding the pup in the grass, thinking, probably that he had gotten lost from the other side, took him up and threw him into the water, with a view of giving him a chance of swimming back home. It was mistaken kindness, however, for he was immediately drowned.

And Dr Mc Intyre, a gentleman who will be often quoted here and who, from his position and his education and character, is entitled to belief whenever he asserts a fact, a fact within his own knowledge, — Dr Mc Intyre “ who has made the seal habits and industry a life study, states “ that it should be particularly noted that they (the pups) are not amphibious until several weeks old ”. They become amphibious only as a result of education and necessity. It is the necessity of going out first, because when the mother feels that she has performed the functions that Nature has ordained by nourishing her offspring with her milk until it is able to contribute to its own necessities, she drives it into the sea; takes it with her teeth or her flippers, and carries it to the sea, compels it to swim, chastises it if it does not, and finally inculcates it with habits which make it, after that time, an amphibious animal. So that it is absolutely true, and it cannot be denied, that during a portion at least of its life, and until education has superseded Nature or at least helped it to the final effort, — during a period of weeks or of months, for we do not all agree about the period, the seal is not amphibious but purely a terres-

trial animal. That is the time when, as I said, not supposing there could be any contradiction to what seemed to me so plain a proposition, the seal was as much our property as the calf, the ewe, the lamb, or the colt upon our premises subject to our decision as to its future we being able to kill it or to preserve it as we liked.

The President. — Would you call that treatment of the young pups by their mothers weaning?

Mr Coudert. — Well, it is in the process of weaning. I have no doubt it is one of the first steps; but the weaning does not take place in those few weeks. The pup is gradually prepared, and the suckling goes on for a period of months.

The President. — While the pup swims?

Mr Coudert. — Well, while the pup is learning to swim; while it is playing about in the water. It is a long time before the pup goes to any great length from the land.

They become accustomed to the water, they choose sheltered spots, they play about in the water, they become familiarized with it and when the season comes and they must go, they follow in the wake of the other animals.

The President. — And then they are weaned?

Mr Coudert. — And then they are weaned, but their mother continues in milk (there may be as to this some question) until late period in the fall.

Now I desire, on this point, to quote from the British Commissioners, and I ought to state now, at once, clearly, the position I take with reference to the report of these gentlemen; and if I use any severity of language at times (which will never I hope pass the bounds of entire courtesy and respect), it is because that report, as I read it, is manifestly an *apologia* for pelagic sealing. These gentlemen — gentlemen of character, of course, education, and intelligence, or they never would have been selected by Her Majesty's Government for these important functions — seem to assume from the beginning that there was a rivalry between the Canadian sealers on the one side and the United States on the other; and that it was their patriotic duty to support pelagic sealing whatever might be the results to the seals. My friend Mr Carter has already alluded to this, and spoken upon it, and, in answer to a question from the learned President, has stated that he attaches no importance whatever to statements in the report.

In another sense I attach a great deal of importance to the statements in the report whenever they may be construed as admissions. I say it now, and I say it frankly, I consider these gentlemen as hostile witnesses; I am at liberty to dispute their statements whenever they are against the side which I am advocating — of course not statements of what they have seen themselves, for I accept their assurances without hesitation; but, whenever they testify against me I have a right to dispute it; and whenever they testify in my favour I have a right to

accept it as an admission, and when I am able to produce an admission from the British Commissioners that squarely, flatly, emphatically covers a certain point, I shall consider my function fulfilled as to that, and assume that my friends on the other side are satisfied with that kind of evidence. And this derives an additional force from the fact that it is a part of the case. These gentlemen have received the very high honor. (and their zeal, if nothing else, entitled them to it), of having their report incorporated into their country's case, and treated as part of it.

The President. — I believe, Mr Coudert, they owe that honor more to the American side, than to the English side.

Mr Coudert. — Well, we are always over generous with our adversaries, and there is nothing that we could do in that direction that would surprise me. But if it was given by them to the American side as a useful contribution to the literature of seal life, seal habits, seal prospects, and seal necessities, I confess my inability to understand why it was done. The British Commissioners say on page 53, section 298, as to the swimming.

It has already been noted that evidence such as to show that the young can swim for a time at or immediately after birth, has been obtained from a number of sources, though it is, at the same time, improbable that under any circumstances the young is at first fitted to maintain its existence for any length of time in the open sea. This is, however, not a matter of any great importance, for it is evidently the normal method for the young to remain for some weeks ashore before venturing even to enter the sea.

The comment upon that I do not accept as part of my argument. I take the fact — the admission — that they cannot swim or support life in the open sea for any length of time immediately following their birth.

I also want to read (and this is taken from the Appendix to the British Case, volume 3 of the papers presented to the British Parliament), the testimony of a Mr Laing who had been pursuing this business. It requires two citations. It is volume 3 of the Appendix to the British Case U. S. of 1892. There is this question on page 184 :

Among all yearling grey pups there has never been anyone known to have found a female? (A) Yes, it is a fact. I have heard a great deal of talk of females having young on the kelp, too, but I do not think that is so. Some hunters report seeing pups off Middleton Island, but I think that is impossible. (Q) Have you ever seen them cut a pup out of a female seal? (A) Yes, and I have seen the pup so cut out walk or move about the deck of the vessel, and I have tried to raise it. I have also thrown it into the water, and have seen it swim about like a young dog. I have seen it keep afloat for fifteen minutes, as long as the vessel was within sight. On the islands the mother seal will take the young and force them into the water to teach them to swim. They will never take the water freely themselves for from six weeks to two months.

Now there, it is only due to say there is something that purports to be evidence. Whether our friends will consider it evidence or not, I do not know. They offer it to us as evidence, but I do not think they will

rely upon it. In case they omit it, I will read it, and your Honours will determine whether this was meant seriously, or whether as a sample of grim humour. I am reading from the Appendix to the Counter Case of Her Majesty's Government, volume 2, page 87.

This is a gentleman who has been seal hunting for 6 years. He was a resident of the city of Victoria, and he says :

New born pups swim if thrown into the water. I remember one that I took from a cow and threw overboard that swam after our boat for over an hour. It, however, made so much noise that I caught it again and killed it, as it interfered with our hunting.

I make no comment upon that; I simply read it. We also assert as a fact that the pup during the first few months of its life, is dependent on the milk of the female for its sustenance, and this will be directly in the range of the enquiry put by the President of the learned Tribunal as to the weaning of the pup. The United States case, pp. 106 and 107 says :

After learning to swim the pup spends its time on land and in the water, but the greater portion is passed on land, until its final departure, which takes place, generally about the middle of November, but the time depends a great deal upon the weather.

In fact, I may say that seals have been known to remain in very mild seasons all through the winter, as I think our testimony will show. It is evident that they are only driven away from there by the extreme cold and the necessities of food, and their departure, like the departure of more intelligent beings, depends on the peculiar conditions of each year. When the season is very severe, they leave early; when the season is favourable and mild, they leave late.

During the entire time the pups remain upon the islands they are dependent solely upon their mothers for sustenance.

The importance of this consideration I need not press, in view of what has already appeared in the Case as to the slaughtering of the mother.

Professor Dall says that the pups require the nourishment of their mothers for at least three to four months after birth, and would perish if deprived of the same. Others fix the period of weaning at at least four months. Others say that the female seal suckles her young as long as it remains on the islands. All agree that without this nourishment the pup would starve to death, and Dr Hereford gives an account of endeavouring to raise a motherless pup by hand, which resulted in its death.

So that even with the utmost tenderness and care, even with the greatest effort, which, of course, cannot be given to a mass of young seals, the seal perishes if the mother is killed.

Now upon that the importance of this question will justify my reading a few extracts from the testimony, and I shall now read from our volume, Part 2nd. It is a sort of collated supplement to the Argument as raised by the subjects. I will say to the Court I have selected some of the testimony, and although the whole of it is interesting and should be read,

and although I shall take the liberty of asking the Court to read it, yet I do not think I am justified in occupying valuable time in reading it all myself, and I therefore select some of the most important witnesses, and shall read what they say upon these subjects. As an apology, let me say, if I am consuming much time, I am comforted by the reflection that I am saving the Arbitrator's time when they come to consider the case, and that they will become imbued with the facts and thoroughly understand them, which will be an advantage, of course that we seek, but at the same time it will be an advantage, when my friends come to answer us, that the Court should be fully apprised of the position we adopt and endeavour to sustain by testimony. The page is 127 of a volume which for convenience has been printed and bound. It is a collation of the testimony upon every subject. It is a sort of digest which has been very convenient to Counsel, and will be very convenient, I have no doubt, to the High Court.

Now Mr Bryant is one of the witnesses who have been most frequently cited. From the permanency of his tenure (being on the island seven years), it is presumable he is a reliable man when he speaks of the things he has seen. I consider myself at liberty to dispute the conclusions of any witness on my side, and on the other side, when they are merely an inference which his mind gathers from facts; but when a man, in the position of that man whose permanency and great tenure of employment recommends his being a credible witness, I think I am bound to accept his testimony unless it is contradicted either by plain facts or by witnesses equally credible with himself. Mr Bryant who was in charge of the islands from 1870 to 1877, says :

The pup is nursed by its mother from its birth on the islands, the mother leaving the islands at different intervals of time after the pup is 3 or 4 days old. I have seen pups which I had previously marked by a ribbon — I suppose those belong to us — left for three or four days consecutively, the mothers going into the water to feed or bathe. A mother seal will instantly recognize her offspring from a large group of pups on the rookery, distinguishing it by its cry and by smell; but I do not think a pup can tell its own mother, as it will nose about any cow which comes near it.

His inference is, it cannot recognize its mother. Perhaps that is true. On the other hand, it may be that the hungry pup does not care whether the sustenance is furnished by its mother or anyone else. At all events, the pup does go about trying to get milk from any seal that it can find, whereas the mother with the maternal instinct given to her to provide for her own offspring and no other, will not be satisfied until she has found her offspring and nourished it.

The President. — Does not that contradict the assertion that when the mother is killed, the pup must necessarily perish.

Mr Coudert. — No, it sustains it. Perhaps I have not made myself clear, or I do not understand the question.

The President. — If the pup takes milk from another nurse.

Mr Coudert. — The pup tries to take milk, and the mother does not

permit it. The pup will take care of itself if the others will let it. The hungry stomach in the pup has no regard to the rights of property, and the pup will go round poaching wherever it can. No human being can tell this Court whether it knows its mother or not. We can infer from its going about, as some do, that it does not recognize its mother. I am inclined to think that that is no proof at all, and that this hungry pup is taught by nature to feed wherever he can get food.

But where the mischief comes, and the destruction reigns, is, that that theory is not accepted by the mother. She preserves her treasures only for her offspring, and when she is dead then the fountain of life is gone. And let me follow out the idea of, the learned President and say that even if it were so—even if it were that the cow will permit any pup to suckle it, that would only be a mitigation, but not a cure, for the remedy; because nature supplies just enough. There is no reason to suppose that it supplies too much. If there are 10,000 mothers nourishing 10,000 pups, and there is just enough sustenance in those 10,000 mothers for those 10,000 pups, if 5,000 of those mothers are killed, suffering and death must ensue because only 5,000 will get sufficient nourishment. Of course it would be mitigated. They might get some little nourishment here and there, and death would not be so instantaneous and sure at the time, but yet, if you were to take away the supply of food, of course there must be suffering, and, if the diminution is great, there must be death. If we show that some of these people take 500, 1,000 and 2,000 mothers full of milk in one of their expeditions, that milk was intended for the pups; the pups do not get it, and therefore the pups die.

The President. — You are not aware that seal milk has ever been collected by man's hand and used perhaps as a beverage and food by the natives?

Mr Coudert. — I do not think that it is. There is no evidence that I have seen in the book that it ever has been. Probably for some reason or other it is not palatable or not acceptable; but, naturally, one would suppose like goats, or any other animal, other than cows, even the effort would be made and that some one would have said that it had great curative properties.

The President. — If it were a domestic animal it would be a natural idea; but your assertion is that the mother seal has only milk for *one* offspring.

Mr Coudert. — That is all. I want to read also from the evidence of another witness, who has been frequently quoted, on page 129, who has lived on the islands since 1869. Of course if he does not know all about seal life he must be a very stupid man, and if he makes a misstatement the probability is he does it intentionally. He says :

Until 1891 we were allowed to kill several thousand pup seals for food in November about the time they were ready to leave the Island. We generally killed ten or twelve for every person on the Island, and when we killed them they were always found to be full of milk.

You will observe that this was in November, when they are on the eve of their departure, and this would carry out what was stated in the case, and prove that it is accurate and true, namely, that during this whole period they subsist entirely on milk,

The President. — At any rate this seems to contradict the statement that female seals are never killed on the islands.

Mr Coudert. — They are not killed on the islands.

The President. — He says that they are found full of milk.

Mr Coudert. — No. The *pups* are found full of milk on opening their stomachs.

The President. — Perhaps so; I beg your pardon.

Mr Coudert. — There is no food found in them. When, then others are killed, fish and various other products of the sea are found in them; but until the pups leave the island there is no evidence that any nutritious substance is found in them except milk. And I may say in this connection to the learned President, that during a long time, and when pelagic sealing had not made the most rigid economy even an average necessity, the inhabitants of the island were allowed to take, for their own purposes of food, a certain number of pups in November; and we can well imagine that they would have preferred to eat the pups rather than the older animals — it was like veal as compared with *Vache en ragoût*, perhaps; but even then only the male pups were killed. And I want to have it well understood — and the question put by the learned President makes me anxious that I should be understood as saying, that absolute and religious respect is paid to the life of the female on the island, and this killing of male pups has been stopped. They do not now allow, even for the purpose of food, the male pups to be killed since this diminution in the supply of seals has been manifest. They must get on with other food; they are at liberty to eat the carcasses of those that are killed for their skins, but it is forbidden to kill a pup even for purposes of food.

Then there is this on the same page, this is from the evidence of Mr Redpath, and I may say he is one of the witnesses we select as being sufficiently reliable. He is a man who had been employed in these islands since 1875.

After learning learning to swim, the pups still draw their sustenance from the cows, and I have noticed at the annual killing of pups for food in November that their stomachs were always full of milk and nothing else, although the cows had left the islands some days before, I have no knowledge of the pups obtaining sustenance of any kind except that furnished by the cows; nor have I ever seen anything but milk in a dead pup's stomach.

If this man is a truthful witness that part of the case is disposed of.

I will now read, from page 114 of our case, a brief extract, I have already touched upon this object :

A cow, as soon as a pup is brought forth, begins to give it nourishment. The act of nursing taking place on land and never in water and she will only suckle her own offspring.

That is what I have been endeavouring to demonstrate.

These facts are verified by many others experienced in the habits of seals; and upon this subject, as to which enquiry was made by the learned President of the Tribunal this is what Mr Morgan says :

The pup does not appear to recognise its mother, attempting to draw milk from any cow it comes in contact with; but a mother will at once recognise her own pup and will allow no other to nurse her. This I know from often observing a cow fight off other pups who approached her, and search out her own pup from among them, which I think she recognises by its smell and cry.

And Mr Falconer, another witness who has had very long and extensive experience, says :

A mother will at once recognise her pup by its cry, hobbling over a thousand bleating pups to reach her own, and every other approaching her save this little animal, she will drive away. These facts are verified by many others experienced in the habits of seals.

Now, in this volume that I was calling attention to a moment ago, volume the 2nd arranged by subjects, there is a mass of testimony which I will only briefly extract passages from. The Arbitrators will do us the justice to see that at least we have made every effort, and the most diligent efforts to satisfy their conscience upon these facts, and that we have produced witnesses not only in great numbers but of the very best character that we were able to get. This is on page 144. The oldest sealer on the Island, who had lived there 50 years, says :

The mother seals know their own pups by smelling them, and no seal will allow any but her own pup to suck her.

Then, on page 146, there is a citation, also from Mr Bryant, whom I have just mentioned, in which he says this, and your Honours will find the name of Mr Bryant cited on both sides constantly.

I am positive that if a mother seal was killed her pup must inevitably perish by starvation. A evidence of this fact I will state that I have taken stray, motherless pups found on the sand beaches and placed them upon the breeding rookeries beside milking females, and in all instances these pups have finally died of starvation.

If he tells the truth, that subject ought to be disposed of. It is not an inference, it is observation, not guess-work. It is the statement of a man who has had eyes and used them, and whose business it was to use them in connection with this very subject.

Now we find a priest on those Islands, Father Kushen, who says on page 145 :

No cow will suckle any pup but her own, and I have often watched a cow driving pups from her until she found her own. She knows her pup by smelling it.

Then says Mr McIntyre :

The pups do not appear to recognize their own dams, but the mother distinguishes her own offspring with unerring accuracy and allows no other to draw her milk.

And another witness, Anton Melovedoff, who has also had very vast experience and who has made very full depositions in this case, says :

When the cows return, they go to their own pups, nor will a cow suckle any pup but her own. The pups would suck any cow that would let them, for they do not seem to know one cow from another.

That is the appearance of them.

No cow will nurse any pup but her own, and I have often watched the pups attempt to suck cows, but they were always driven off; and this fact convinces me that the cow recognises her own pup and that the pup does not know its dam.

I have now given the High Tribunal the testimony that we produce on this subject. It seems to us that it is absolutely conclusive. In fact, from the very nature of it, assuming it to be reliable, it cannot be questioned. If these men, who had lived on the Islands those many years, with that vast experience say : we said this, and we did this, and we know this, you may bring a heap of scientists who will say we never saw, heard, or did this, and yet the testimony must remain unshaken.

The British Commissioners, however, place great reliance upon the testimony of a gentleman, Mr Macoun, a gentleman of character and intelligence, who visited the Island and was there for a very brief period. He was there in 1892; that is last year, and spent some time, there no doubt in a conscientious investigation of seal-life; and, if his testimony should differ from that of the others, I should say the others, being equally credible, are entitled to be believed because their experience is of the highest order and of the most extensive character. But although Mr. Macoun is brought forward as a witness, apparently, to dispute our propositions, — perhaps he is not, but, apparently, as he is adduced as a witness on this subject, we will assume that he is supposed to contradict us, — I will submit to the Court, if there were no other testimony in the case than that of Mr. Macoun, the propositions stated in support of the Case of the United States would find full support in it, and it should be taken as conclusive, so far as experience limited in extent and in point of time can ever be supposed to fix definitely a scientific proposition.

Now, I want to read Mr. Macoun's testimony in the Appendix to Her Britannic Majesty's Counter Case, volume I, on page 142 : " On St George Island, 15th July, " ——— this is very interesting; it is very graphic. It is well told. All our witnesses have not the same facility of expression as Dr Macoun, and it is quite refreshing to find a man able to express himself in such an interesting manner.

On St. George Island, 15th July, as I sat on the low cliffs overlooking a part of North rookery, I saw three cows come ashore. One of them was still gravid.

Senator Morgan. — What year is he speaking of?

Mr Coudert. — 1892. He was there for a few days in 1891; but his first visit of any extent was in 1892.

I saw three cows come ashore. One of these was still gravid. Each of the others on coming out, turned her head about from side to side uttering at short intervals a cry used by most female seals as they come ashore. In each case several pups went towards the cow, in one instance five were about her at one time

These were smelt or nosed over and shoved away, or struck gently with a flipper, and one by one they dropped off. The cow then moved slowly back towards the rear of the rookery. She was "attached" by nearly every pup she passed close to. These she put away from her, calling out from time to time as if for her own young one. Amongst the first pups that had approached her was one that persistently followed her, attempting to suck every time she stopped, several times securing the teat, while the cow nosed over other pups. It was evident,

Perhaps it would not have been as evident to the other and more experienced men as to Mr Macoun; but it was evident to him.

that the mother seal was searching for her own young one, and that she thought that the pup following her was not it, as, often while the young one was close beside her, the cow would stop at a pod of pups and examine and smell every one of them. Whenever this pup attempted to suck and was seen, or perhaps felt, by the mother seal, it was pushed away and she moved on, followed as before by the pup. She reached at last a small harem near the back of the rookery, where she lay down on her side and soon asleep.

Still followed, you will observe, by this persistent pup! *Tenacem propositi* he certainly was; and, whether his claim was founded on good title as far as lineage is concerned, is a matter of inference; I think the inference is tolerably right.

The pup immediately began to suck, stopping whenever the cow awakened, which happened at very short intervals, beginning again as soon as the cow slept. It was at last satisfied, and lay down at some distance away and went to sleep.

Now, I read from a little further down.

On the 18th July, on North rookery, St. George Island, a cow was seen by me to come from the water, and after calling out as if for her young one, she was approached by several pups, as had been noted frequently before; and, as is usual when cows come from the water, these pups attempted to suck, but were driven away. One persistently followed her; the cow smelt it over many times, as if uncertain whether it was her own or not, but did not stop, and pushed the pup from her. Though the pup continued following her, the cow did not cease crying out at intervals in the manner peculiar to them when calling for their young ones. Other pups came to her, which she smelt in the usual way, but finally she lay down and allowed the pup that had been following her from the first to nurse. If this pup were her own, it would seem that the female was for a long time uncertain whether it was so or not,

These scientists make very nice distinction on these subjects which, perhaps, our plainer men do not make as to the mental operations of the cow in recognising her pup :

For while the pup kept up with her most of the time, and was often beside her, she continued to call out as if dissatisfied, and did not cease smelling all the pups that came to her. It is noteworthy that she did not go to the back of the rookery-ground, but, after reaching the middle of it moved about to the right and left for more than 15 minutes, the pup following her, and lay down at last on a rock that she had passed several times. Were the pup her own, there is no apparent reason why she should not have lain down when first joined by it.

Probably she had reasons of her own; I am utterly unable to say to the court what the reason was.

Had the pup not followed her and finally been allowed to nurse, her actions

were such that any one must have concluded that, for more than 15 minutes, she had been searching for her pup without finding it.

But as the pup did follow her and did finally nurse, why then this hypothesis does not come into play.

In both cases referred to above, the pups persisted in following the cows, though repulsed by them, and, while in one instance the cow laid down and went to sleep, the pup then helping itself; in the other, the cow, after a long delay, and in evident uncertainty as to whether the pup were her own or not, voluntarily suckled it.

How the evident uncertainty of a mother-cow could be explained to this scientific gentleman, I am also at a loss to understand.

Instances similar to these were noted whenever any considerable time was spent in watching a particular part of a rookery.

This is, in every case a number of pups pursued the mother and were driven away, and finally she consented that one of the pups should get sustenance.

At any time pups might be seen nursing everywhere on the rookeries, but it was not often that a female was actually seen to come from the water, and, within a short time, find a pup to nurse, as would be expected if it were true that she had been a long distance out at sea, and perhaps many days absent from the rookery. When females were seen to come from the sea and soon afterwards allow a pup to nurse, it was generally under circumstances such as those above referred to.

Now if this happened only in the case of the cows coming from sea and not of those that were remaining on land, possibly a suggestion that I have heard made, but which I cannot give as evidence, for I do not know that it is in the case, may suggest itself to the mind of the court, that on coming from the sea, being still drenched with the water, they refuse for some reason that nature has taught them, to allow the pup to suckle. We know in the domestic life of animals there are certain reservations, and wise masters will not allow a heated animal to suck her young, but there the master comes in, the proprietor, who is intelligent enough to understand these rules and laws of nature.

On the 16th July, at Starry Arteel Rookery, St. George Island, I watched five female seals come from the water at different times. All called out at intervals as if for their young ones. As they slowly made their way among the harems many pups attempted to nurse, but none were allowed to do so, and every one of these cows, after wandering about for some time in an apparently aimless manner, lay down and went to sleep without having given up any milk.

What can be stronger than that. Does not it outweigh any speculation as to the mental operations of the cow? Here, with nature clamouring to the cow that she should be rid of this which was given to her for distribution and not to preserve — with this embarrassing material about her, with all these pups clamouring for food, she refuses, and finally goes to sleep with her udder still distended, because nature had instructed her, when she was born, that she should give this only to her young. And in connection with this would like to cite, and I take great pleasure in citing,

a gentleman as to whose intelligence and character there can be no dispute, and whom we are happy to call our friend. I allude to Mr. Tupper in Appendix, Volume 3 Behring Sea Arbitration, papers presented to the British Parliament, page 436 — the title is U. S. No 2 — Mr Tupper in his memorandum on Mr Blaine's letter to Sir Julian Pauncefote, dated March 1st, says, in connection with the statement that indiscriminate slaughter destroyed them by thousands,

This statement, cited in the United States Case, is direct authority for the Canadian contention. It illustrates three important points.

That indiscriminate slaughter on the breeding grounds is injurious, and in time destructive.

Which we accept, which we claim, and which we insist upon, that the indiscriminate slaughter on the breeding grounds is injurious, and must in time be destructive. It has been destructive in the past in every sealery except this of Behring Sea.

2. That when the mothers are killed, the young pups dying in consequence, are found on the island.

This is the point that we consider extremely important to establish. Then he quotes Mr Taylor who was on the islands in 1881, and this is on page 439 the same book.

The witness thinks there is some damage done in killing and shooting of the cows, and leaving so many young without their mothers. ' There would be less doubt respecting the cows being shot, or lost if it was satisfactorily shown that large numbers of young pups were found dead in the rookeries.

The point of all this, in fact the double point, is this, that we show in the first place that this animal, at times at least — during a certain period of the year at least, is a terrestrial and quasi-domestic animal. We show that the pup is entirely dependent upon its mother, and, as a corollary from which there can be no dissent, when the mother is killed under those circumstance the pup must perish. As I had the honour to state to the Court yesterday, when a pelagic sealer kills a nursing mother he kills the pup on the island with unerring accuracy. The death of the pup is as sure to follow the death of the mother as the sun to follow the night. He is able by this process to kill two or three at one time. In all cases we may say when he kills the mother on the feeding grounds 100 or 200 miles away, leaving a pup on shore, that there is the destruction of three animals, and the skin of one only secured, if there are no green hunters about, and only skilful ones who are able to rescue the one that is shot before it sinks to the bottom of the sea.

We also claim (and this is an admitted fact in the case) that the pup migrates with others in the herd in the fall. As to the course of the migration of the herd, that is also practically admitted. I do not think there is any such difference between us as to require any examination. It is also stated (and as to this there is no contradiction) that when the bulls leave the islands, they never go further south or, at all events,

seldom go further south, and are seldom, if ever, seen south of latitude 50°. The other animals go further south, and that may be of some importance, not much, I think, in considering the question of the double residence which is assigned to these animals by the British Commissioners. It is said that they have two homes, one on the islands and the other on the open sea. It is proved that the other seals than the bulls do go further south, and that shows of itself that there is no common home even at sea for the whole herd of the animals. Certainly the bulls are entitled to some consideration as members of the family of seals, and it being proved that they do not go further south than 50°, and it being proved that the others go and are seen even as far as the coast of California, the evidence is irresistible that they have no common centre of attraction outside the Pribilof Islands.

The President. — You mean the cows and pups.

Mr Coudert. — I mean the cows and pups.

The President. — And the bachelors.

Mr Coudert. — And the bachelors; they go south; but I say, as a herd, as a family — the father, the mother and the children — there is no home for them upon the earth and upon the sea except upon the Pribilof Islands. I mean there is no home where they can at any time unite and make their common habitat or domicile. As is stated by the British Commissioners on that point at page 31, section 193.

It is a noteworthy and interesting fact, ascertained in the course of the present inquiry, that the full-grown males, known as "beach-masters" or "seacatchie" have seldom or never been reported to the south of the 50th parallel, while all other classes of seals are found in considerable numbers much further south.

So that when they all gather together on those islands they gather there by their common consent and instinct. That is the only place which they frequent together as a family or herd. To me, I confess, it seems to verge upon absurdity to talk about a double habitat for these animals a habitat or home upon the land and another upon a space of 4,000 miles of Ocean. They leave their home for food. They are driven away by the necessities of climate. They never land at any other place. They never live upon land unless on our islands, and I think we are justified in saying, beyond any fear of contradiction, that that is the only home that they have.

That they do not land on any other except the Pribilof Islands I say is practically admitted, but I would like to read one or two extracts in order that I may not ask the court to take anything for granted. Now I select, and this is taken from the collated testimony page 86, a brief extract from the testimony of Mr Daniel Webster, and I do this with especial satisfaction, because Mr Webster is not only an intelligent and reliable man, but the British Commissioners themselves have spoken of him as a man in whom trust could be placed. He entered the Islands with the United States and has lived there ever since and so conducted

himself and so shown himself, that even the British Commissioners accept him as a reliable and truthful witness.

In my twenty-three years' experience as a whaler in Behring Sea and the North Pacific, during which time I visited every part of the coast surrounding these waters and my subsequent twenty-four years' experience on the seal Islands in Behring and Okhotsk seas, I have never known or heard of any place where the Alaskan fur-seals breed except on the Pribilof group in Behring Sea. These islands are isolated and seems to possess the necessary climatic conditions to make them the favourite breeding grounds of the Alaskan fur-seals, and it is here they congregate during the summer months of each year to bring forth and rear their young.

I shall not multiply extracts for as I conceive that to be admitted and with some slight differences in expression I think I may say the British Commissioners themselves acceded to that. They do threaten and say that if we do not mend our methods on the Islands these animals may be driven off and go to some unknown place. They do not tell us to what place they might go. If they did we might protect ourselves by acquiring those islands or lands wherever they may be. But after all, with all respect for the ingenuity of the speculation, it is only speculation, and as these seals have been going there for 100 years and they have never been treated so well in the Islands as they are now, I think we may view with some composure the threat that they may leave us at some indefinite period for some undefined spot.

Mr Justice Harlan. — Is the blue colour on the map intended to show the general migration route of the seal from the Pribilof Islands and back.

Mr Coudert. — Yes, the dark lines show the track pursued by the bulls. Although I have stated that, I will stop there, I will read but two or three lines from the deposition of Mr Laing. It is very brief. He is one of the most experienced witnesses. This is page 188 of Volume 3 of the British Appendix.

You have never heard of any rookery along the coast? I never heard of one. There is a rookery of sea lions off Queen Charlotte Island, but I never heard of any of seals.

Now, I want to call attention to another point, and one of considerable importance; and I am free to say I do not know whether there is any dispute about it or not. I think it is practically admitted; but I would prefer, in view of its importance to read some testimony briefly on the subject. I read from the United States' Case, page 94, as to the distinction; and I shall read a very few lines :

The two great herds of fur-seals which frequent the Behring Sea and North Pacific Ocean and make their homes on the Pribilof Islands, respectively, are entirely distinct from each other.

That is a proposition which we think is plainly and clearly established by the testimony.

I will read upon this the statement of the British Commissioners; section 19d :

The facts already cited in connection with the migration of the seals on the east side of the Pacific, show that these animals enter and leave Behring Sea almost entirely by the eastern passes through the Aleutian chain, and that only under exceptional circumstances, and under stress of weather, are some young seals, while on their way south, driven as far to the west as Atka Island.

Mr Justice Harlan. — Is that the westernmost Island?

Mr Coudert. — No. It is there.

[*Mr Lansing pointed it out on the map.*]

It is only under exceptional circumstances that a few pups, being light and weak, are driven by stress of weather as far west as the Island that Mr Lansing has just pointed out.

No large bodies of migrating seals are known to pass near Attu Island, the westernmost of the Aleutians.

That is still further west; the extreme Island, nearest to the Commander Islands. _____

And no young seals have ever within memory been seen there. These circumstances, with others which it is not necessary to detail here, are sufficient to demonstrate that the main migration-routes of the seals frequenting the Commander Islands do not touch the Aleutian chain, and there is every reason to believe that although the seals become more or less commingled in Behring Sea during the summer, the migration-routes of the two sides of the North Pacific are essentially distinct.

I beg to call the special attention, of this High Tribunal, to that concession on the part of the British Commissioners.

We do not admit even the slightest commingling of individual seals during the summer. On the contrary we deny it, but we take this concession that the migration routes of the two sides of the North Pacific are essentially distinct, in other words that these are two absolutely different families or herds of seals — that they do not commingle — that they are separate and distinct in material particulars and there is no confusing the two.

Then on the same point, and it is a very important point, as relating to the question of property as well as to the question of pelagic sealing—I read from the British report.

The inquiries and observations now made, however, enable it to be shown that the fur-seals of the two sides of the North Pacific belong in the main to practically distinct migration-tracts.

This the High Court will see is precisely what we claim.

They belong in the main to practically distinct migration tracts, both of which are elsewhere traced out and described and it is believed,

And even this exceptional instance which is about to be stated is not inserted but interjected into the case by way of opinion.

and it is believed that while to a certain extent transfers of individual seals or of small groups occur, probably every year, between the Pribylof and Commander

tribes, that this is exceptional rather than normal. It is not believed that any voluntary or systematic movement of fur-seals takes place from one group of breeding islands to the other, but it is probable that a continued harassing of the seals upon one group might result in the course of years in a corresponding gradual accession to the other group.

I will call attention presently to the map which is referred to by these gentlemen.

If it is the desire of the Tribunal to get further light, the map that is cited by the British Commissioners is found in their Report which your Honours have before you, and it is a map illustrating the migration routes and resorts of the fur-seals in the North Pacific. I only call attention to it to say that the Court will see how far apart they are, what distance apart they are; and it is difficult to believe that a partial commingling of individual seals would take place. I ask the Court to notice that there is this suggestion, that a continual harassing of the seals might drive the American seals to Russia or the Russian seals to America. What foundation there is for that, perhaps the Tribunal may be careful enough to enquire into. I can give no light upon that. Upon what it is founded, I do not know, and why it is to be presumed that these seals after an occupancy, to our knowledge, of a full century, would start across an unknown ocean and make an interchange of domiciles, I repeat, I can give no light upon.

Then section 454.

There is no evidence whatever to show that any considerable branch of the seal tribe which has its winter home off the coast of British Columbia resorts in summer to the Commander Islands, whether voluntarily or led thither in pursuit of food-fishes, and inquiries along the Aleutian chain show that no regular migration route follows its direction, whether to the north or south of Islands. It is certain that the young seals in going southward from the Pribilof Islands only rarely get drifted as far to the westward as the 172nd meridian of west longitude, while Attu Island, on the 173rd meridian east, is never visited by young seals, and therefore lies between the regular autumn migration-routes of the seals going from the Pribilof and Commander Islands respectively?

That is admirably stated; it is admirably clear, and in the main, it is precisely what we contend. It shows that these two migrations are distinct; that these two families have their respective homes, and that they have never commingled; they never do commingle, and they never can commingle unless their habits should entirely change for some reason which is not yet disclosed.

Now to close this branch of my quotations still borrowing from the British Report and reading, but three or four lines of section 224 :

The broad and general facts of the annual migration habits of the fur-sea do not appear to depend primarily upon the pursuit of food, but rather seem to be governed by the instinctive resort to the breeding islands in the spring, followed by the equally instinctive departure for more Southern latitudes on the approach of the cold and snows of winter.

Of course, it is their instinct that leads them to go to the Pribilof Islands in the summer and of course, it is their instinct that sends them off when the severity of the winter makes that habitat intolerable.

The President. — Is there any great difference between the climate of the Behring Sea and that of the North West Coast.

Mr Coudert. — Yes. The climate is itself very cool there; sun shine very seldom appears. They take it for that reason, — it is very cool and very moist, and the sun may not shine for a week in the whole year and it very seldom rains.

Senator Morgan. — You are speaking of the Islands?

Mr Coudert. — Yes, and then go south some of them as far as the coast of California, except the bulls. When the British Commissioners speak of the seals on the Coast of British Columbia, we might say the seals on the coast of California; they are the same seals and in their migration they do undoubtedly pass the coast of British Columbia on their way back.

It will be apparent at once to the High Tribunal that this question of the possible intermixture or commingling of the seals is, as I have stated one of capital importance : it goes directly to our right of property. If it could have been shown that these seals ran to and fro, that they would spend a month or two on the Commander Islands and a month or two on the Pribiloff Islands, that there is no means of ascertaining from the kind of skin, its colour, its fineness, its texture, and the like, whether they are our seals or not, an argument might be made, and it might be said “ If you will tell us how to recognize your seals, we will respect them ”. May I trespass upon the indulgence of this High Court and dwell upon this point which, as you see, in its ramifications is of the highest importance : it goes to the skins of the animals, where they come from, are they to be identified? When the skin is removed from the animals, it is sent to London, which is the great city where the industry is carried on of preparing the skin, and where they are all received.

So also the Commander skins, is there any difference? If there is any difference, if there is a different species of animals, — if they are as different as Jersey and Guernsey cows, — if there is any difference as between the breed of horses as between the Percheron and Norman, if there is a difference in the skins, we propose to prove, and I think it is overwhelming that there is such a difference in the skin itself as to shew, apart from any other consideration or argument that these are entirely distinct families.

We are now leaving the sphere of testimony in which the pelagic sealers and the inhabitants of the Pribiloff Islands figure so largely, and we can go to Mr Bevington. His testimony is cited, I will say for the convenience of our friends on the other side, in the argument of the United States, page 233. Of course, these gentlemen are men who stand very high in commerce. Their position is one which entitles them to be treated with great respect especially when they are testifying in favour of the United States. We are bound to give them the highest credit. This is on page 233. Mr Bevington is called. He is a subject of her Britannic Majesty; 40 years of age; the head of the firm of Bevington

and Morris, 28 Cannon Street in the city of London. His testimony as a whole will be found in volume 2 of the Appendix; but I will not read the whole. He says upon the subject of the variations observable :

That the differences between the three several sorts of skins last mentioned, those are of the Commander Islands, the Pribiloff Islands, and the Robben Islands,_____

are so marked as to enable any person skilled in the business or accustomed to handle the same to readily distinguish the skins of one catch from those of another, especially in bulk, and it is the fact that when they reach the market the skins of each class come separately and are not found mingled with those belonging to the other classes. The skins of the Copper Island catch are distinguished from the skins of the Alaska and Northwest,_____

Perhaps this high Tribunal will not understand what the Northwest catch may be. It is the Pribilof Island seals killed by hunters. That is what the northwest catch is. They are all Alaska seals; they are all the same family of seals, some killed with discrimination upon the land, and the others killed without discrimination upon the sea :

Which two last-mentioned classes of skins appear to be nearly allied to each other and are of the same general character, by reason of the fact that in their raw state,_____

He is speaking of the Copper skins.

the Copper skins, are lighter in colour than either of the other two, and in the dyed state there is a marked difference in the appearance of the fur of the Copper and the other two classes of skins. This difference is difficult to describe to a person unaccustomed to handle skins, but it is nevertheless clear and distinct to an expert, and may be generally described by saying that the Copper skins are of a close, short and shiny fur, particularly down by the flank, to a greater extent than the Alaska and Northwest skins.

We are now going to Mr Morgan who was the agent in 1891 of the Russian Sealskin Company, of St Petersburg. He was on the Pribilof Island in 1868 and 1869, and from 1874 to 1887 as agent of the lessees. His testimony is abstracted on page 235 of the same volume. He says :

The Alaska fur-seal breeds, I am thoroughly convinced only upon the Pribilof Islands; that I have been on the Alaska coast and also along the Aleutian Islands; that at no points have I ever observed seals haul out on land except at the Pribilof Islands, now have I been able to obtain any authentic information which causes me to believe such is the case.

The Alaska fur-seal is migratory, leaving the Pribiloff Islands in the early winter, going southward into the Pacific and returning again in May, June, and July to said islands. I have observed certain bull-seals return year after year to the same place on the rookeries, and I have been informed by natives that have lived on the islands that this is a well known fact, and has been observed by them so often that they stated it as an absolute fact.

I was on the Bering Island at the same time that Sir George Baden-Powell and Dr George M. Dawson, the British representatives of the Bering Sea Joint Commission, were upon said island investigating the Russian sealeries upon the Komandorski Islands; that I was present at an examination, which said Commissioners held, of Sniegeroff, the chief of the natives on the Bering Island, who, prior to the cession of the Pribiloff Islands by Russia to the United States, had resided on St. Paul, one of the Pribiloff Islands, and that since that time had been a resident

on said Bering Island, and during the latter part of said residence had occupied the position of native chief, and as such superintended the taking and killing of fur-seals on said Bering Island; that during said examination the Commissioners through an interpreter, asked said Sniegeroff if there was any difference between the seals found on the Pribiloff Islands and the seals found on the Komandorski Islands; that said Sniegeroff at once replied that there was a difference, and on further questioning stated that such difference consisted in the fact that the Komandorski Island seals were a slimmer animal in the neck and flank than the Pribiloff Island seals; and further, that both hair and fur of the Komandorski Island seal were longer than the Pribiloff Island seal; said Commissioners asked said Sniegeroff the further question whether he believed that the Pribiloff herd and the Komandorski herd ever mingled, and he replied that he did not.

Now Mr Morgan is also engaged to a great extent and on a large scale in business. He is engaged in dressing and dyeing the skins. He says at page 236 :

The skins belonging to these several catches are catalogued separately, sold separately, and are of different values and necessarily, therefore, bring different prices in the market.

There is no better test after all than that. The money value of the skin in the open market is shown not by the sales made in this year, or last year, but made year after year.

Sir Charles Russell. — He does not say that on page 236.

Mr Coudert. — I am reading from the summary of the evidence. Then he says :

The differences between these several classes of skins are so marked as to enable any person skilled in the business to readily distinguish one from the other.

Mr Justice Harlan. — You are not reading from the printed argument, and we are unable to follow you, Mr Coudert.

Mr Coudert. — I am reading from the summary of the evidence. It is volume 2 of the appendix, page 569.

I will now read from page 237 of the argument quoting from Mr Poland, page 571 of the same book. Mr Poland's qualifications were of the best. He is a subject of Her Majesty and the head of the firm of P. R. Poland and son doing business at 110 Queen Victoria Street in the City of London. His firm had lasted over a 100 years, having been founded by his great grandfather in the year 1785, and if there is anything in heredity, he ought to understand all about seal skins. His judgment is entitled to great respect, and he says on page 571 of Volume 2 of the Appendix to the case of the United States.

That the three classes of skins are easily distinguishable from each other by any person skilled in the business or accustomed to handling skins in the raw state. That deponent has personally handled the samples of the skins dealt in by this firm and would himself have no difficulty in distinguishing the skins of the Copper Island catch from the skins of the Alaska and north west catch, by reason of the fact that in the raw state the Copper Island skins have a lighter colour and the fur is rather shorter in pile and of an inferior quality the skins of each of the three classes have different values and command different prices in the market.

Now I shall read some of the evidence of Mr George Rice on page 573

of Volume 2 of the Appendix to the United States Case. Mr Rice, I may say, is another of that class of witnesses that is entitled to particular respect.

[The Tribunal then adjourned for a short time.]

The President. — Mr Coudert, if you are ready, we are.

Mr Coudert. — Thank you, Sir, I propose, may it please you, Mr President and the members of this High Tribunal, to close this examination and reading of extracts by two or three very brief extracts on the same subject on the intermingling of herds. I shall read but three or four lines (it will not be worth while to trouble the Court to look to the book), from the Second volume of the Appendix to the United States Case, on page 438, the testimony of Alexander Mc Lean. He is asked :

In your opinion, do the seals on the Russian side intermingle with those on the Pacific side or are they a separate herd ?

That is a pointed question and deserves a categorical answer. He says :

They are a different herd of seals altogether.

Then Daniel Mc Lean is asked the same question on page 444 of the same book :

In your opinion do the seals on the Russian side intermingle with those on the Pacific side ? — (A). No, Sir, I do not think so. They are different seals in my opinion.

I may say with regard to both of these witnesses, that they are really vouched for by the Canadian Inspector of Fisheries in his Reports of 1886, page 267, and mentioned by him in such a way that we have a right to read their testimony with the confidence that it will be accepted on these points. That is the testimony of those two men and I propose (always stating to the Court that what I have read is only a small part of the testimony which we claim to be overwhelming on this subject), to read from the evidence of Mr Morris Moss. His testimony should be read because of his high position in connection with this business.

Now Mr Morris Moss testifies at page 341 of the same book, volume 2, of the United States Appendix. Mr Moss, I should say, (and this is the reason I have selected his testimony out of the great mass that I have before me), is the vice-president of the Sealers' Association of Victoria, presumably acquainted with the business, and testifying with knowledge of the subject. He says :

There are two great herds or armies of fur-seals that frequent the North Pacific Ocean and Behring Sea. They are quite distinct from each other, and do not intermingle. The one army appears off the coast of California, in the latter part of December, and gradually work their way northward, and are joined by others coming, apparently, from mid-ocean.

They appear to travel in two columns, the outer column containing an army only of bulls, and the inner one mostly cows and yearlings. These columns are not continuous schools of seals, but rather small parties scattered along. The column travelling along the British Columbia coast, head for the Pribilof Islands, their natural breeding ground. The other army proceeds along the Japanese coast, and

head for the Commander and Robben Islands. I believe that the seals always return to the place of their birth.

Perhaps I might have been satisfied with reading this alone to the Court, emanating from such a source, (which is certainly not one favourable to the United States), and have claimed that until it was contradicted it should be considered conclusive upon the point; but if the High Tribunal desires mores, it will find an abundance of corroborative proof in the Case.

The President. — This last witness was a pelagic sealer?

Mr Coudert. — He is the Vice-President of the Sealers' Association of Victoria.

The President. — But he was a pelagic sealer.

Mr Coudert. — You are speaking, Sir, of the last witness?

The President. — Yes.

Mr Coudert. — Yes, he is the Vice-President of the Sealers' Association of Victoria.

The President. — Those are pelagic sealers.

Mr Coudert. — Yes; and he is speaking with his knowledge of this subject.

The President. — Does he carry on his business on the other side of the Pacific — the Japanese and Russian coasts?

Mr Coudert. — He deals in skins — I do not think that he undertakes to get them on the high seas. His is the safer and more comfortable business of remaining on land, and dealing with the skins after they have been taken from the animals.

Mr Gram. — Mr Coudert, if you will allow me, I will draw your attention to what is stated in the British Counter Case, page 136 and following. It commences thus.

Since the date of the Report of the British Commissioners, information obtained from pelagic sealers and seamen engaged in navigating in various parts of the North Pacific has resulted in the accumulation of an over whelming amount of evidence supporting the position that no constant separation exists between the seals, frequenting the two sides of the Ocean.

Mr Coudert. — Yes.

Mr Gram. — And in the following pages there are reported a good number of instances.

Mr Coudert. — Yes; I was coming to that subject. I am glad that the learned Arbitrator called my attention to it, but taking even the proposition as broadly stated as it can be by the counsel, what does it amount to? — that the evidence is overwhelming that no constant separation exists between the seals frequenting the two sides of this ocean. Does it mean anything more than what is stated by the British Commissioners as an exceptional case of stragglers being found everywhere? I think when the learned arbitrator examines the case, he will find that it is nothing more than a reiteration, under a stronger form, of the exceptional instances adduced by the British Commissioners; that there is nowhere

an allegation — and that is all that I care to establish — that those two herds, armies, tribes, or families, are not absolutely distinct. Even if it were true, which we deny, — and we claim to use their expression that the evidence is overwhelming on the point — even if it were true that there is an occasional running into each other, and out, of each other of these, on the borders of each of them, yet that the two herds are distinct, that they all follow their own migrations; that they each have their own home; and, that, in the true sense of the word, there is no intermingling. Secondly, there is no constant union of them; and all that they claim is that no constant separation exists between the seals — not between the *families*. I do not think that it will be argued by our learned friends different from that. The British Commissioners have given especial attention to that, and the result that they have reached; and if their supplemental report and defence of their own work is read, it will be found that they did not go outside that.

Mr Gram. — Yes, but this evidence is prepared posterior to the British Commissioners, of course, is it not — these instances which are quoted here?

Mr Coudert. — What that evidence may be, that is subsequent to that, is very difficult to tell. I think that probably it is intended to show by the dealers in skins that there is a confusion in the skins, and I was coming to that very point.

Mr Justice Harlan. — But they mean more than that by their evidence.

Mr Gram. — Yes, much more than that.

Mr Justice Harlan. — They intend more than that.

The President. — I suppose we must wait until the gentlemen themselves tell us what they mean, and that will come in time.

Mr Coudert. — They mean I think what I have stated, and also what probably the learned Arbitrator suggests, and had in mind that in crossing over the ocean seals have been found, they say, all over.

Mr Gram. — Yes.

Mr Coudert. — I think that is what they mean.

Mr Gram. — At any time — I think so.

Mr Justice Harlan. — On the page referred to the head line is, “ statements particularly bearing on the intermingling of fur-seals in all parts of the North Pacific ”.

Mr Coudert. — What page is your Honour reading from?

Mr Justice Harlan. — Page 23 of the British Counter Case Appendix, Volume 2. The object of that proof, as Judge Gram suggests is to maintain the proposition that seals intermingle at all times in all parts of the Pacific.

Mr Coudert. — Assuming that to be true, I would quote the words of the President of the Tribunal, what do they mean by that? What is meant by that? Is it meant that they intermingle simply by crossing the same lines, or is it meant to intimate that the families become united, and that

there is an alliance between the two tribes, so that one of the seals of the Pribilof Islands will have mixed blood of the Commander and Pribilof Islands, and on the other side the Commander Island seal will have Alaskan blood?

The President. — I cannot ask you to explain what the other side mean, and what they intend, but it is enough I think, (and it was important) that one of the Arbitrators pointed out to you, the fact which lies in the papers before the Tribunal, and which we have to take into consideration.

Mr Coudert. — Yes, and I may say to the Arbitrator that I am indebted to the court whenever any enquiry is made, in the first place because it shows I am honoured with the attention of the Arbitrators; and secondly, that I ought to understand my case sufficiently to be able to answer a question sufficiently well. I say with regard to that, that if it is intended to say that there is this casual intermingling — this crossing of each others lines, and a going to and coming from the water territory — the maritime jurisdiction — of the other, in the first place it is absolutely immaterial if that be so. In the second place it is absolutely denied; and if it is material, your Honours will have to weigh the testimony upon that. If the inference is intended to be carried to the mind of the court that there is any intermixture of blood, then I say there is not a scintilla of evidence but all the evidence is the other way, and it is of the loosest kind. Some of them say that they have found seals all over occasionally.

More or less. The expression of those who say that they have seen seals all over, is, more or less, every day, they have seen seals.

In two or three instances, the latitudes are given, and then we can shew to your Honours that although some distance at sea, that would be precisely at the lines of migration north or south of the seals wherever they locate. *Dolus versatur in generalibus*, might apply. It is easy for a man to say, “ I saw them for the great Ocean was so thick that navigation was impeded ”. Anybody could say that; but I would like to know, very much, Mr Captain of the sealing vessel, in what latitude you saw those? Is your Log-book there? Produce your Log-book; and when you tell me it was in a certain latitude, I have something to work upon, and I may be able to satisfy the Court that that is just the place where you ought to find seals. You find the Alaska seals going north, or Alaska seals going south, which is taking an extreme westerly direction. You naturally would, at certain seasons find them there. But, as the learned President said, I am speculating — I do not know exactly what will be claimed, and perhaps it would be just as well on that side, to hear what our distinguished friends have to say. But I think this is the answer, — and I desire to make it as satisfactory as I can even at the expense of repetition — that even if the sea were narrower, and it should be supposed that these animals while intending to go home for the south did, on their extreme lines touch

each other and individual seals come in contact and that is called intermingling, it does not in the slightest degree change the case — no more than the fact that my Jersey cow goes over my fence among your Guernsey cows and then comes back, makes the slightest difference to my rights of property, or as to the habits of the animal, or the distinctive characteristics of each.

Now it is just to say (and it is right in the line of the suggestion of the learned Arbitrator), that we have something which approaches a judicial proceeding on the part of our friends on the other side—that is, that they have resorted to something like cross-examination. How precious that is to those conversant with the system of Great Britain, which we have adopted, I need not say, to the English Judges and Jurists. We consider it most essential to the administration of justice, and it is essential probably because it has been habitual, and justice has been conducted from time immemorial in that way; and my friends on the other side very naturally, and very properly, (finding that we have taken gentlemen of high character belonging to their own nation, presumably disposed to help them), undertook to crossexamine the witnesses that we had cited.

Now, in the first place, let me say, when we take such men as Bevington, Poland, and the rest of them, and nobody could charge them with being bribed or unduly influenced by the United States — when these gentlemen spontaneously made their depositions for us — these London furriers — they are the most eminent men in the business — when they say they can at once tell the difference between a Pribyloff skin or an Alaska skin, (which is the same thing), and a Commander Island skin — if that is true, they put their foot at once upon all question with regard to inter-mingling or inter-mixture of blood. If it is true, that is the end. It shews that that distinction is there, that it has always been there, that it continues to exist; and the two herds, armies, or families, are entirely separate and distinct. I say our distinguished friends have undertaken to cross-examine these witnesses, and of course have used nothing but the most proper methods which we would expect from gentlemen of their high character, and they think that they have shaken the testimony, in some respect, of these witnessess.

Now this will be a sample — I am referring to page 230 of volume II of the Appendix to the Counter-Case of Her Britannic Majesty's Government. Now these are all cross-examinations, and the Arbitrators will see at the outset that these gentlemen, in cross-examination, had been fully furnished by us in our Case with the testimony that we had elicited from these witnesses, and upon which we relied. There was no objection to their putting leading questions, and to informing them of the points which they desired to establish.

Now Mr Poland, on page 230 (after stating how long he had been a partner in the concern), says :

As regards the difference between Copper and Alaskan skins, I have always considered that the chief difference was that Alaskan fur was a better quality that

is to say, denser than the fur of the Copper Island seals. This is the difference which makes the Alaskan skins fetch more in the market than Copper skins. The difference in price is also, I think, influenced by the fact that the people responsible for slaughtering the animals on the Pribylof Islands are more successful and skilled in flaying, curing, and selecting, than the Copper Island people.

That is simply his opinion, but he states the fact to be, without any hesitation or mitigation, that the difference which makes the Alaskan skin fetch more, is, that the fur is of a better quality, being denser than the fur of the Copper Island seal, due, probably, to some climatic difference. Of course when we say that there is a difference between the Copper Island skin, and the Alaskan skin, we must not lose sight of the fact that all these animals belong to the same genus or species, and that there must be very great resemblance between them. They are all seals; they are all fur-seals; they all belong to the general creation of seals; and the difference must of necessity be one such as this that is shewn and none can be more important than the fineness or density of the fur.

And if there were nothing else in the case — if nothing more were proved than that the Alaskan skin of the Paris market or London market brought a very much higher price than the Copper skin, would not that be of itself decisive of the question? In order to produce a larger price it must be superior, and the superiority must naturally consist of the texture of the skin and the fur. But that is not all that this gentleman says even on his cross examination: there are also other differences between the Coppers and Alaskans, namely the difference in the colour of the fur — the fur of the Coppers being, on the whole, of a more bronzy yellow colour than the Alaska. Then there is this statement (and this, I suppose, if anything, is going to be relied upon by the other side):

In inspecting the shipments made through Messrs. Lampson from the Pribiloff Islands, I have from time to time noticed the presence amongst them of skins which were undistinguishable from Copper Island skins, and also in the same way I have noticed amongst Copper Island consignments, skins which are evidently of the Alaskan description. I have also noticed skins in both classes which in a lesser degree resemble the other class.

That is as far, I think, as any witness undertakes to go — that possibly there may be another mixture; but upon this you will observe that there is not one single witness who will testify that he ever found a skin which he would call a Copper skin, in a consignment of Alaskan skins. They say that they have found certain skins which touch each other — which approach each other — perhaps some of the poorer skins resembling better skins of the other; but I find no where in the case — (and if I am wrong, when the time comes my friends can contradict me; I certainly mean to state the fact as I understand it) — where any witness is willing to place himself upon the fact, upon his oath and upon his honor, that he has found, in an Alaskan consignment, a skin which he would declare to be a Copper skin. The furthest he has ever gone is to say there are some which touch each other so closely that he would not like to state the difference with any certainty.

We have the testimony of Mr Révillon. Mr Révillon has been examined, and I read from Mr Révillon's evidence on page 230 of the same Volume.

The President. — Is that the same deposition which is in your Appendix? He has also been examined by Mons. Vignaud.

Mr Coudert. — This is the cross-examination. After we submitted to our friends on the other side our depositions, they availed themselves of the right to cross-examine. This is volume 2 of the Behring Sea Arbitration Appendix to the Counter Case. I do not want to comment upon the fact, but I think I am entitled to suggest to the learned Tribunal that this difference that they now speak of for the first time with reference to these witnesses cannot have struck them as being very material since they did not mention it in depositions intended, of course, to enlighten the Court and to state the truth. They stated emphatically that they were able to distinguish the skins, that they could distinguish at all times an Alaska from a Copper skin, and *vice versa*; and, of course, they were in good faith when they made the statement, and it was only subsequently that, under cross-examination, they were reminded that there might be instances in which the two skins were, in general appearance, brought so closely upon each other, that they might hesitate upon a distinction.

So that it is fair to say that these gentlemen did not and could not in good faith attach much importance to that, or they would have called the attention of the United States in their depositions to the circumstances.

I desire also in connection with this to draw the inference, which I think I am right in drawing from the fact that many of these gentlemen, if not all, are easily and readily accessible, living in London and ready no doubt at the request of any of my learned friends to state all that they knew, that none of these have been cross-examined. When I say none of those, I mean none of those appearing here, because of course I do not know if they were cross examined or not, or whether their cross-examination was not sufficiently satisfactory to justify the Counsel on the other side in inserting the result among their papers. So that we have a number of witnesses actually proffered for examination and have the examination only of a part, and that part only goes to the extent of saying, which may very well be true without in the slightest degree impairing the position of the United States, that in some cases these animals belonging, as they do, to the same general family of the brute creation, bear such a resemblance to each other that taking a particular skin, on the verge of an extreme line it will resemble the skin of another branch of the same family on another line. But I find that no one of these gentlemen is willing to testify on his oath that he found a Copper skin in an Alaska consignment.

Senator Morgan. — Mr Coudert, when you speak of Alaska consignments, do you mean that those are consignments made from the Pribilof Islands?

Mr Coudert. — Yes. I take it that applies to the North-West skins as well as to the Pribilof Islands. That is what you will permit me to say,

perhaps, in anticipation of the judgement, what we call for the sake of convenience and the assertion of principle, *our* seals, and that comprises all the Alaska seals and the North-West catch.

The President. — Are you aware which way the Russian seal skins come to London. Do they intermingle at Victoria with the other seals?

Mr Coudert. — They all go to London.

The President. — But which way?

Mr Coudert. — Through San Francisco most of them, if not all of them — they all find their way to London; and there they are regularly sorted and dyed and dressed to suit the fashion of the day.

The President. — Is there not a general market in Victoria? Are not the consignments made from there?

Sir Richard Webster. — No, they are shipped straight through.

The President. — Direct?

Lord Hannen. — Yes.

The President. — There is no fear of their being mixed.

Lord Hannen. — No, there is no possibility of that.

Mr Coudert. — No, I was reading from the testimony of Mr Révillon, and he is called upon to say that they do not buy by the sex of the animal whose skin is offered. Of course, we do not pretend that they do. That is a question that is not of the slightest consequence. What we say is, that the enormous bulk of skins, except these taken on our soil which contain no female skins, the enormous bulk is made up of female skins; therefore the point of that in the way of cross-examination, I confess I do not understand.

But Mr Révillon is asked his opinion with regard to monopolies. I have no doubt he is a very intelligent gentleman, and possibly his opinion on monopolies, in an abstract way, may be of value. But what it has to do with this case, I do not know. At all events, I will, in justice to him — it is only a few lines, — read the question and answer. It is important as showing the lines upon which the witnesses have been cross-examined, the idea being to inculcate in them a dread that, if the United States were given a monopoly, their business and daily bread would disappear. Mr Révillon, however, was not so easily frightened :

Would not the total suppression of all the pelagic sealing have the effect of giving the Company leasing the islands an absolute monopoly of the business in this class of seals? — [A.] This might be so; I do not know. [2.] Well, assuming that that would be so, do you think it would be a result that would be beneficial to the fur-seal business? — [A.] It depends how the monopoly is managed, but speaking generally I am against monopolies, and in favour of a free market. I think monopolies injure the progress of business.

We may all agree to that; and I should be very sorry to suppose that, because we are arguing the United States have a right to that, we are for that reason bound to advocate any monopoly. A monopoly, if it be one, is a result inevitable from the nature of things.

But, as practical men, where would we look for evidence upon this

subject assuming that men differ? There is very little difference; I do not think that this shade of difference in the deposition is worth considering; but where would the Tribunal look, where would a man, whose business it was to deal with the finances of a country interested in this business, look to know whether or not there was any, and, if so, what difference in the quality of the seals? He would have at his command methods of determining it which are absolutely certain; to wit, the price; and if it be the fact that, on the market, the United States' seal-skins of Alaska always bring a very much larger price, not a mere passing, gentle fluctuation, but something radical, something recognized, something I would say phenomenal, then you would say, why, of course, there is a distinction, — that an Alaska skin is one thing and a Commander skin is another.

Now have we proved that to the Court? The Court will be surprised to find what the price will be. Of course, such of the Tribunal, if any, as have had occasion in Paris to buy them, will know there is nothing more expensive than a real "Peau d'Alaska"; but, apart from the experience which may be individual, isolated, exceptional and possibly misleading, what idea have we upon the subject of the market? Here, we read again from volume 2, from which I have been reading largely, of that Appendix to our Case page 572. Mr Rice, a subject of Her Majesty, who has been engaged in this business for 27 years, says :

That the difference between the several classes of skins are very marked, and enable anybody who is skilled in the business or accustomed to handling of fur seal skins to distinguish the skins of one class from the skins which belong to either of the other two classes and these differences are evidenced by the fact that the skins obtain different prices in the market.

That the differences between the skins of the adult male seals and the adult female seals are as marked as the differences between the skins of the two sexes of other animals, and that in the Northwest catch from 85 to 90 per cent of the skins are of the female animal.

Deponent does not mean to state that these figures are mathematically accurate, but they are, in his judgment, approximately exact.

The difference between the Copper Island catch and the Northwest and Alaska catches, which two last-mentioned classes of skins of the fur-seal apparently belong to the same family, are such as to enable any person skilled in the business to distinguish the Coppers from the Northwest and Alaska skins, or what I may call the Behring Sea sealskins, but the manner in which the skins are distinguished is difficult to describe to any person not accustomed to handling skins. The difference again between the Alaska and Northwest catches, although as deponent has said they are of the same general family, are yet very marked by reason of the difference of the colour of the hair, the length of the wool, which is, of course, perceptible mainly upon examination of the pelts and of the fact that the female skins show the marks of the breast.

The differences between the three classes of skins above mentioned are so marked that the skins belonging to the three catches have always, since deponent had any knowledge of the business,

that is for 27 years,

commanded, and do now command, different prices in the markets; for instance, the Alaska skins of the last year's catch fetched about 125s. per skin; the Copper skins of the last year's catch fetched 68s. 6d. per skin.

And that difference is not the difference of a year, which might be explained upon the ground of scarcity, or over-abundance, or glut in the market; but that is the general difference. What is the use of talking after that, or discussing the question whether they are the same?

Here is another of the same kind, Mr Stamp I read from volume 2 page 574. This is Mr William Charles Blatspiel Stamp. He is a furrier 51 years of age, and a subject of her Majesty, he

is engaged in business at 28 Knightrider Street, London, E.-C. as a fur and skin merchant. That he has been engaged in that business for upwards of thirty years and has been in the habit of purchasing fur-seal skins during the whole of the time that he has been in business. That he has personally handled many thousands of such fur-seal skins and he has inspected the samples at practically every sale of fur-skins made in London during the whole of the time he has been in business.

Surely that man has experience and when we present him to the Court and show that he has been cross-examined besides, we feel that we have done our duty to the Court in the selection at least of the material that we furnish.

In consequence of these facts and of his knowledge of the fur-seal skin business he has a general and detailed knowledge of the history of the business of dealing in fur-seal skins in the City of London, and of the character and differences which distinguishes the several kinds of skins coming on the market.

Then he goes on :

That for many years last past the fur-seal skins coming on the London market have been known as the Alaska catch, which are the skins of seals killed upon the Pribilof Islands situated in the Behring sea; second the Copper island catch which are the skins of seals killed on the Kommandorski and Robben Islands in the Russian waters.

E then goes on and I shall not read what he says as to distinction.

The skins of these several catches are readily distinguished from each other and the skins of the different sexes may be as readily distinguished from each other as skins of the different sexes of any other animal.

I beg your Honours to notice that, although it may not be directly upon the point that we are now examining, but it is material and very material indeed in the case.

I should estimate the proportion of female skins included within the north west catch at at least 75 p. cent and I should not be surprised nor feel inclined to contradict an estimate of upwards of 90 per cent.

Senator Morgan. — That North-West catch is the pelagic catch.

Mr Coudert. — Yes, that is distinguished from the Alaska in that way, when it is spoken of in that connexion, but the seals are practically and in fact, the same seals.

The President. — Yet there is a difference in price.

Mr Coudert. — Yes, there is this difference between the skins of the animals killed on our islands and the pelagic catch, and that is, ours are slain without wounds; that is, the animal is knocked on the head and is easily killed in that way.

Sir Charles Russell. — And not shot in the skin?

Mr Coudert. — The others are shot with a shot gun, and the skin is often riddled with the shot, and a great destruction of the beauty of the skin necessarily follows. In the Copper Islands the same process is followed by Russia. We adopted the Russian system, and it is carried on, as I think, with certain improvements, on the Pribiloff Islands; but it is the same thing—when an Alaska skin is found riddled with shot or a Commander skin is found riddled with shot, it is known that it is the result of pelagic hunting.

Now, to come back to a point from which I had somewhat deviated : as to the price. I was calling the attention of the Court to the difference between the skins, and reading from the deposition of Mr Stamp. His deposition was so interesting and important in another aspect of the case, that I allowed myself to be tempted into reading it for the purpose of showing the enormous number of females in the pelagic catch. It is irrelevant to the point under discussion, but I take the opportunity of giving the Court the evidence.

Now as to the difference in price, let me in connexion with that, repeat the important statement that the seals on the Commander Islands are treated and killed in the same way, so that, if there is any large, material, overwhelming, difference, it must, of course, be due to the innate quality of the Alaskan skin, and the real inferiority of the Commander Islands skin. In fact, as General Foster reminds me, and as the evidence shows until 1890 this was strongly the case, because the lessees were the same and it was the same Company that managed the business on both sides, and it is fair to assume they did it practically in the same way.

The President. — Up to 1890.

Mr Coudert. — Up to 1890.

The President. — They were American lessees.

Mr Coudert. — Yes, it was a Corporation.

The President. — But they have disagreed or broken their arrangement with Russia?

Mr Coudert. — I think not. The lease expired, and that is all.

The President. — And has not been renewed. You stated yesterday that it is a Russian Company. It is a separate, independent Russian Company, is it not?

Mr Coudert. — Yes, there is a Russian Company, the Company that tomesly operated both places. When the lease expired, a new lease was made with other parties on the Pribyloff Islands, and the Russians have taken another Company.

The President. — The American lessees are not the same.

Mr Coudert. — No, it is a new Company.

The President. — Are you aware the old Company ever complained of pelagic sealing on the Russian side?

Mr Coudert. — I think not; I think Russia took care there should be no cause of complaint.

Sir Charles Russell. — Oh ! no.

Mr Couder. — Till lately, of course, when the pelagic sealing was prevented on our side because the United States vindicated their right by stopping the ships, there is no doubt about that. Then I understand the efforts of the pelagic sealers took a westward direction, and the Commander Island seals suffered in consequence. It was only when we stopped it in 1891.

The President. — The Copper seals would be mixed pelagic and territorial seals to-day, if there is pelagic sealing carried on on the Russian side, westward — I would infer from that, that the skins from the Copper islands or Russian islands, if those seals would be both from pelagic sealing and from sealing on land, would be mixed. If there is pelagic sealing carried on on that side, if that herd is subject to being hunted on sea, there must be pelagic sealing skins.

Sir Charles Russell. — I think, Mr President, we might remove a possible misapprehension about that. There can be no difference between us. There would be no mixture in the Market even in the case of seals pursued in the more western part of Behring Sea or North Pacific, because the pelagic sealing would not be carried on by the same persons who carried on the land clubbing on the Commander Islands. They would be sold distinct. Those who are lessees and in charge of the Commander Islands did not practise pelagic slaughter, and the skins of those killed on land would not be mixed with those of the pelagic catch.

The President. — But do they come as Copper island skins, or only the other ones.

Sir Charles Russell. — They would come as the North West catch.

The President. — That is the question, you know.

Mr Couder. — I understand that those killed by the pelagic operators on the other side of the Pacific Ocean go as the Japan catch.

Sir Richard Webster. — That is quite wrong.

The President. — That is why we desire information.

Mr Phelps. — You will find in the affidavits of the London furriers a complete account of the manner in which this business is done. It is only necessary to recur to that testimony to show how the skins reach the London market — to find out how it is done.

Mr Coudert. — And that is what I propose to read to the learned Court.

As to the question the President put, the Commander Island skins are the same, whether killed at sea or on land. There is no doubt about that. I understand that those killed at sea on the western side of the Pacific Ocean go to the market as the Japan catch.

Sir Charles Russell. — No, that is not so.

Mr Phelps. — They go as the Copper or Commander Islands catch.

Mr Coudert. — Well, I will read the evidence on that. I am indebted to the President for having relieved the monotony of this Argument by throwing a brand of discord among us.

The President. — I wish to clear it up.

Mr Coudert. — It is extremely refreshing to me. I do not know if it is to the Court, but it cannot be otherwise. I have just read to the High Tribunal the cross-examination of Mr Stamp. I will have in mind the question put, and see what the fact is with regard to that.

Mr Justice Harlan. — Have you read all of that Deposition that you want to read?

Mr Coudert. — No ; I have not. I am thankful to Mr Justice Harlan for calling my attention to it. This is what this expert says :

The differences between the Copper and Alaska skins are difficult to describe so that they can be understood by any person who has no practical knowledge of furs, but to anyone skilled in the business there are apparent differences in colour between the Copper and Alaska skins, and a difference in the length and qualities of the hairs which compose the fur, and there are also apparent slight differences in the shape of the skins.

The differences between the skins of the three catches are so marked that they have always been expressed in the different prices obtained for the skins. I have attended the sales for many years, and am able to make this statement from my own knowledge. The average prices obtained at the sales of the last year's catch, for instance, were as follows : For the Alaska skins, 125 shillings per skin ; for the Copper skins, 68 shillings per skin ; and for the Northwest skins, 53 shillings per skin.

This corroborates what I have already read, and emphasizes the point I want to make that although the difference in price between a mutilated skin, the skin of an animal riddled with shot, and that of one killed as we kill it on the islands, is plain and easily accounted for, yet when you find that the same company, using the same methods and dealing with an animal of the same general genus or species, when you find the product of the industry is so different that in one case the skin brings 125s—, and in the other about one half, then the difference in the thing itself is so manifest and so great that it cannot be whittled away and minimised by any pretence that there is any intermixture.

Now with regard to the witnesses that have been cross-examined, before I abandon this subject, I want to say, and this is taken from the Appendix to the British Case volume 2 p. 230 to 253 — you will find there the testimony and. I will take the substance of it and state what the result is.

I take one single declaration which is concurred in by a very large number — 27 I think of these witnesses.

We have such witnesses as Mr Richard Henry Poland, William Henry Smith, Thomas Ince, Sydney Poland, — I think I may say that we have the prominent men in that trade in London and this is a declaration in cross examination which many of them (I think 27 — and I have the names here) make. This is a condensation almost their very words, but you have to read from 230 to 253 to verify the accuracy of my summing up.

That the fur of the Alaskan seal is of a better quality and denser than that of the Copper seal, and that the difference makes the latter skins less valuable than the former.

This statement, I say, is subscribed to by 27 London furriers, and this

is the comparison between these two classes of skins, in these respective jurisdictions under the control of the same party.

I now, with the permission of the Court, will say to my learned friends on the other side, if they wish to follow me, I am reading from the Argument of the United States on page 244. This is the testimony of Mr Alfred Fraser. It is taken from the United States second volume, but it is quoted verbatim here, and my learned friends will probably not care to examine the book. If they do, it is pages 554 to 558. It is the testimony of Mr Alfred Fraser who is a subject of Her Britannic Majesty, and resides in the city of Brooklyn.

He is a man of very large experience. He was connected with this business, and he says, which seems hardly credible that many hundred thousand skins passed physically through his hands, that is the skins, he says, sold by C. M. Lampson and Co, of which large firm he was a member. He says :

Deponent is further of the opinion, from his long observation and handling of the skins of the several catches, that the skins of the Alaska and Copper catches are readily distinguishable from each other, and that the herds from which such skins are obtained do not, in fact intermingle with each other because the skins classified under the head of Copper catch are not found among the consignments of skins received from the Alaska catch and *vice versa*.

It is hardly possible that this man who had hundreds of thousands of skins going through his hands would have permitted such a phenomenon to escape his attention as that which indicated a commixture of the herds.

Deponent further says that the distinction between the skins of the several catches is so marked that in his judgment he would, for instance have had no difficulty, had there been included among 100 000 skins in the Alaska catch 1 000 skins of the Copper catch, in distinguishing the 1 000 Copper skins and separating them from the 99 000 Alaska skins, or that any other person with equal or less experience in the handling of skins, would be equally able to distinguish them.

And in the same way deponent thinks, from his own personal experience in handling skins that he would have no difficulty whatever in separating the skins of the Northwest catch from the skins of the Alaska catch.

This is one of the questions that was suggested a moment ago by one of the learned Arbitrators. I would therefore call attention especially to this :

He would have no difficulty whatever in separating the skins of the North West catch from the skins of the Alaska catch.

Lord Hannen. — Will you allow me to put a question to you ?

Mr Coudert. — I wish you would.

Lord Hannen. — I observe that Revillon frères say that they never buy or sell by sex. It is never mentioned in any sale catalogue. " We buy lots which are made up according to sizes, " etc. Are there any witnesses to whom you can refer me, who appear to have had the duty in the course of their business, I mean, of ascertaining to what

sex the skins belong. Of course we have a number of statements, varying largely. Some of the statements go to as high as 90 per cent of females.

Mr Coudert. — Yes sir; even 95 per cent.

Lord Hannen. — I want to know upon what basis that is determined.

Mr Coudert. — There is abundant testimony, over whelming testimony. Now, if your Lordship asks me whether there is any witness whose duty it is in connection with the business specially to declare what the proportion of the sexes is, I will not be able to do it.

Lord Hannen. — Or whose business it is to observe it — what man's duty it is to observe whether a skin is a male or a female skin?

Mr Coudert. — In the first place, you will observe, when they come from the Islands, they are all males; there are no female skins.

Lord Hannen. — No; I am dealing with the other.

Mr Coudert. — When they come from the other sources, they say that they observe — naturally, in taking so important an article of commerce, and one of such value, they observe all its characteristics.

Lord Hannen. — I wanted you to distinguish, if you can, between Revillon frères, who say that they...

Mr Coudert. — They do not buy by sex. The female skin is always a good skin of itself, and there is no distinction when they are sold and bought. If a merchant goes to buy skins, he does not ask for female skins or for male skins; but these witnesses all say that when they examine the skins, the evidence of the sex is such that they determine it at once; and when it comes to the pelagic question.

The President. — No, they do not all say that. That depends on the stage of the process. When the skins are salted and prepared, they cannot distinguish the sex. Some of them have said that. I think Revillon has said that.

Senator Morgan. — Mr Coudert, do I understand you to say that there is any testimony in this case to the effect that after a skin has been salted and prepared for market, there is no further opportunity for distinguishing the sex?

Mr Coudert. — Oh no, Sir. On the contrary, it can always be distinguished.

Senator Morgan. — I understood the learned President to say that was his understanding.

The President. — Yes, I distinctly understand that. I think the British Commissioners admit that, and state it.

Lord Hannen. — The point of my question is this : I wanted to see whether at any stage of the process, from killing to selling in the market, any man's attention is necessarily drawn to the question of sex.

Mr Coudert. — Let me read, directly in answer to Lord Hannen's question, from volume 2 of the Appendix to Her Majesty's Counter-Case, page 232. This is one of their witnesses; and let me observe that this is to meet our testimony, that the female catch represented 90 or 95 per cent.

One witness, Grebnitzky, I think, says it is 95 per cent; but in order to meet this — and this will be an answer to the Arbitrator's question — our friends on the other side produced witnesses to minimize the proportion; and Mr Moxon, of the firm of Culverwell, Brooks and Company, is called and sworn, and he says in answer to one of these questions :

Q. Have you, with the view to informing yourself on the question, lately examined any consignments of north-west seal skins? — A. Yes, last week.

This is in answer to Lord Hannen's question.

I went carefully through a parcels of 2,000, and came to the conclusion that the percentage of females did not exceed 75 per cent at the most.

Now, here is a man; an expert.

Sir Charles Russell. — Will you kindly read the question immediately before that.

Mr Coudert. — Yes sir :

Q. Have you ever had to consider the proportion of females in the north-west catch? — A. Not until this question arose, because prior to that no distinction was ever made, either in buying skins or in selling them. They are simply sorted in quality and size, and not for the question of sex.

But he had been prepared to give his testimony to minimize the force of ours, and he did for the first time go and corroborate our testimony to the extent that it was at least 75 per cent.

The President. — But in fact, you have not answered Lord Hannen's question, you know. I suppose you cannot. Perhaps nobody can.

Mr Coudert. — If nobody can, I am sure I cannot, Mr President; but I would not like to make such an admission, and I am sure you would not expect me, even by my silence, to admit that you can put any question on this subject that I cannot answer. (Laughter.)

I will say this : I propose to show by testimony, which I take to be overwhelming, that witnesses in this case have in handling these skins, physically, as Mr Moxon says, considered the question of sex, and that they are able to testify that a certain proportion in every consignment consisted of female skins. Now, if you ask me whether in the innermost machinery of the business there is an individual whose office and function it is to pass upon the sex of the animal.

Lord Hannen. — No, no — anyone who, in the course of his business, would find it necessary to decide the question of sex.

Mr Coudert. — I would answer it in this way, even if it should be an imperfect answer : That these skins, of course are costly and valuable. They are thoroughly examined. Their condition has to be examined, and in many cases they have to be repaired — perhaps in almost every case, to a greater or less extent; and in examining them, the question of sex presents itself to the examiner. An experienced examiner will tell you just how many of each sex there are; and perhaps — that is a mere

hypothesis — this has become more marked of late years for this reason, that the number of female skins in the market is only a recent product. Until recently there were no female skins. It was only about 1876, 1878, 1879, 1880 and 1881 that this business began and took its progression, that the three ships grew into fifty, and the fifty into a hundred; and naturally these men examining the skins would observe the sex. They could not help it. Even if I am unable to give a reason, though I may not satisfy the conscience of the Court, when I produce credible witnesses who say, “ We did examine it, and we know ”; even if I cannot dive into their motive; if I cannot show that it was part of their particular function in the business; if I produce men of standing and character who say, “ I have examined one hundred thousand skins, and there were only five thousand males ”; I have not satisfied the Court upon that, assuming — I have not produced it yet — but assuming that I shall produce it?

The President. — I suppose those are mostly sealers?

Mr Coudert. — Furriers, sir. I dismiss the sealers.

The President. — Will you just allow me to read an extract from Revillon. Revillon says :

That all the skins bought by the said firm of Révillon Frères are dyed in France, and therefore the skins pass under our eyes in the following conditions: (1) in salt when we buy them in London; (2) dressed; (3) dyed. That deponent believes that the firm of Révillon Frères is by far the largest firm of furriers and fur-dealers in France; that the greater part of the skins bought by Révillon Frères are made up into garments, cloaks and mantles, but that some of the skins after having been dyed are sold to other manufacturers.

That the sales of sealskins by the said firm of Révillon Frères have amounted for the last twenty years to about 4,000,000 francs per year.

He knows the skins as they are in these three conditions, — in the very condition of salt when they come from London. He proceeds :

That later on, from the year 1878, we have noticed in the London market seal-skins called Victoria or Northwest coast skins, the quantity of which is variable, but which has continually increased until last year, when the total quantity was held at 80,000 skins.

That is the only approximation we have...

That we have often heard, and from different sources, that these last named skins are in the majority the skins of the female seal. The thinness of the hair upon the flanks seems to confirm this assertion, although it is impossible for us to test the absolute truth of this statement for ourselves, for when the seals have been dressed the signs of the mammals disappear. At any rate the employment of these skins is much less advantageous to our business because there is a great predominance of small skins, etc.

There is a man who has had 400,000 seal skins passing through his hands in twenty years, and who has received them in three different conditions, first, in salt, when he buys them from London : and yet he says it is impossible to distinguish the sex.

Mr Coudert. — I am quite aware, Mr President, that Mr Revillon made that statement.

The President. — Perhaps it is contradicted by others?

Mr Coudert. — I have tried to reconcile that with the other testimony; and it may be that Mr Révillon is not as strong upon that, although his opinion was that there was this large quantity of female skins. It may be either that he, being the head of the firm, attending perhaps to the sales, had not given it the attention that others had.

But I say now, and I shall to-morrow morning produce before you such an array of witnesses that I think I can say in advance no doubt will be left upon the question, that they can distinguish; that the other side, in the British Commissioners' Report, admits that it can be done, and that these men say they have done it, and their testimony is uncontradicted in the Case. That, with the permission of the Tribunal, I shall take up to-morrow morning.

Mr Justice Harlan. — I was going to ask you whether there is any proof bearing on the question as to the ability to distinguish the sex, according to the time when they are delivered to the furriers. I notice that the gentleman whose deposition was just read by the President says that it is difficult to determine the sex after the skins have been dressed. Is not the sex more easily distinguished before they are dressed?

Mr. Coudert. — Yes, sir. There is abundant testimony upon that; and with the permission of the arbitrator, I think it would be more coherent if I addressed myself to the whole of it together. I have endeavoured, so far as I was able to answer the questions of the Arbitrators and have been obliged to deflect a little from the ordinary course; but I can assure the high court of Arbitration that I appreciate the importance of this point. It is one of the points upon which we rely and we are very confident, respectfully confident that the character and amount of testimony that we will produce is such as to leave no question on the subject.

Senator Morgan. — Mr. Coudert, at the time the question was put to you by Lord Hannen, some half an hour ago I think it was, since which there has been a discussion or examination of this question, you were reading a part of the record here and had not completed it. Will you be good enough to complete it.

Mr. Coudert. — I will, sir. I have got very far from my starting point; but the discussion was interesting and I hope I have to some extent been able to answer the questions.

Lord Hannen. — I am very sorry if I have deflected you from your argument.

Mr Coudert. — Deflection, sir, is refreshing; and I always consider it a personal favour when one of the Arbitrators does me the honour to interrupt me.

The President. — We have favored you to-day in that way.

Mr Coudert. — Not more than you should, and not more than I like.

Something was said about the fur-seal skin industry, and some questions were asked by the learned Arbitrators upon that subject. It may be interesting to read one single deposition to know what the general

nature of this industry is, how it is conducted and what its particular elements may be ; and we do now as we did before, take the best information it is possible to get and go to the highest and best sources. Certainly whatever comments our friends may make as to our views of the case, they cannot complain that we have not taken from among them men of the highest character. We take Sir George Lampson, Baronet, on page 565 of the second volume of the Appendix to the Case of the United States. He has been of course engaged in this business for a long time. His father was engaged in the business before him. The business is sixty years old at least. I read from paragraph 4. The whole would be interesting, but it would take too much of the time of the Tribunal :

(4) Deponent says that what may be described as the fur-skin business has been built up, that is the product, the fur-seal skins, have been made an article of fashion and commerce, and the sales of such skins largely increased and the methods of dressing and dyeing the same have been perfected almost entirely through the influence and joint endeavors of the Alaska Commercial Company, the North American Commercial Company, the Russian Seal Skin Company, deponent's own firm, and the firm of C. W. Martin and Sons, and their predecessors in the city of London.

That the business at the present time has attained the rank of an important industry, in which there is embarked in the city of London a large amount of capital and upon which there is dependent a large number of workmen and employés. The amount of capital from time to time invested in the business is correctly stated, deponent believes, by Mr Teichmann, at as much as £ 1,000,000, and until within a year or two the numbers of persons depending upon the industry for their support has likewise been correctly stated by Mr Teichmann, approximately at 2,000 persons, receiving on an average a weekly wage of 30 shillings, and most of them having families dependent upon their labors for their support.

During the last two years the diminution and irregularity of the supply of fur and seal skins has caused some decrease in the amount of persons engaged in the industry, but deponent is not able to state exactly to what extent such decrease has taken place.

A considerable number of the persons employed in this business, as deponent is informed, are not skilled in any other kind of business, and should the fur-seal industry cease, deponent believes that these persons would be obliged to master some other trade or means of livelihood.

That one of the most important, and deponent feels justified in saying, vital elements in the maintenance and preservation of the business or industry is that the supply of fur-seal skins should be regular and constant so that intending buyers may be able to know beforehand approximately what the prices of their stock in trade are going to be, and that the people engaged in the business may have beforehand a reasonably definite notion of what they shall be able to count upon.

(5) Deponent has no doubt but that it is necessary in order to maintain the industry that steps should be taken to preserve the existence of the seal herd in the North Pacific Ocean and Behring Sea from the fate which has overtaken the herds in the South Seas. Of the steps, if any, which are necessary, in order to accomplish this result, deponent does not feel that he is in a position to state as he has no personal knowledge of the regulations which at the present time exist, but it is obvious to deponent's mind that regulations of some kind imposed by somebody who has authority and power to enforce them are necessary to prevent the rookeries in the North Pacific Ocean from suffering the fate of the rookeries in the Southern Atlantic and Pacific seas, where deponent is informed no restrictions were at any time even attempted to be imposed.

This is Mr. Lampson, under date of April 23, 1892; and I may say in

that connection, in order to show the enormous experience that must necessarily have been acquired by these gentlemen, that they have sold four-fifths of all the skins sold in London since the year 1870. It is almost a monopoly of that business for the last twenty years; and if there is any source of information to which we can resort with a hope of being satisfied, it must certainly be there.

The next proposition of fact is one which is admitted, I think, and therefore I shall not offer any proof upon the subject, that is that the herd returns to the islands.

Then the bulls and cows go to the breeding grounds, the non-breeding males to the hauling grounds.

Upon this, as those expressions are constantly used in the Case, perhaps a brief explanation would be well to show the court what the difference is between the breeding grounds. Those of the honorable Arbitrators who have not examined the question, will be curious perhaps to see, and interested to learn how the instinct of these animals guides them to take their different parts of their general abode. I am reading from the Case of the United States, at page 91, where it is said :

« The breeding grounds' or 'breeding rookeries' (the areas occupied by the breeding seals and their offspring). That is the bulls, the cows and the pups... are rocky areas along the water's edge, covered with broken pieces of lava of various sizes and shapes those nearest the sea having been rounded by the action of the waves and the ice; between the rocks are sometimes found smooth spaces of ground, but in no case are these areas of any extent, and they vary greatly in size. »

So strong is the instinct, so imperative the necessity of obedience to that instinct that, as I have already read, these animals not only go back to the island and to the same general locality, but the bulls in many instances have been found — the same bulls — to take precisely the same spot.

That is for the breeding grounds. The hauling grounds are thus spoken of in our Case :

The "hauling grounds" (areas occupied by the non breeding seals) are the sandy beaches at one side of the breeding grounds, or the smoother spaces back of and contiguous to the breeding seals. The areas covered by the rookeries on the respective islands vary considerably, being in the ratio of about seven or eight on St. Paul to one on St. George.

It has appeared all through the Case that St. George was smaller than St. Paul, and that there were a very much smaller number of seals on it. St. Paul is much lower than St. George, the shores are broader, and more territory is available upon it for occupation by seals than on the latter, which accounts in a measure for the disproportion in seal population on the two islands.

I will not dwell upon that any further. We also state, and that proposition is not disputed, that the fur-seal is a polygamous animal. I would

read in connection with that but three or four lines from the report of the British Commissioners, in section 37, on page 7.

Among the first of the more stringent measures adopted are the restriction of killing to males.

That is measures or regulations adopted on the islands. Let me, however, preface this by saying that when the United States bought from Russia, this industry, established by Russia and carried on by her, was intelligently carried on with a due discrimination as to sex. We introduced no innovation, except that we sought to improve the methods already in operation, partly by elevating the character of the residents in the place, and partly by such additional regulations for the protection of seal life as might be suggested.

The British Commissioners say :

Among the first of the more stringent measures adopted was the restriction of killing to males, which followed from the discovery that a much larger number of males were born than were actually required for service on the breeding rookeries.

This was the great secret. Until that was discovered and put into effect of course the secret of cultivating the seal was not discovered, it was overlooked, and the fundamental dictates and laws of nature were disregarded. Of course where the attack was indiscriminate the result was obvious. But the Russians soon discovered this, and long before the United States came into power through the purchase of the islands the killing was confined to the young male seals.

I do not care to go into the discussion of the number that composed the females in the family of the seal. There is much discussion as to that which seems to me unnecessary, whether it is 15, 20 or 25, whether it is 40 or 50. There is evidence upon that all through the Case. The British Commissioners state certain figures, and they rely upon the British Cyclopaedia, which was printed fifty years ago and say that according to the ordinary and general rule there the family consisted of one male and 40, 50 and even 60 females. But it is not important when we recollect that the seal is a polygamous animal, and that a large number of females go with every single male; and this makes at once the obvious necessity of a discrimination. To kill a female, of course, under those circumstances, is a crime.

I say, therefore, I will not dwell upon that subject of the average number in the family. I do not consider it is material, as the facts are plainly shown that there is a sufficient number of the males for the females.

I spoke of the breeding rookeries and the hauling grounds, and read from the Case in order to show a distinction between those two; but it is proper for an understanding of the methods of these animals at their home on these islands to say that the distinction disappears at a certain period of the year. They come there, as appears, alternately; The bulls coming first and remaining on the rookeries there waiting patiently for weeks without food and they come in rotation. But there is as general mix-

ture of the family about the end of July and then the distinction between the breeding grounds and the hauling grounds is broken up; and the severe line of demarcation between the older members of the household and the younger members disappears. Then many of the larger ones which we have called the bachelors — that is the name under which they are known — are allowed to mingle with the other animals, the older ones, the mothers, the cows and so on, and the hauling place presents a confused appearance. These nice lines of demarcation have been obliterated.

The male seal — this is another view of the case — on the breeding grounds when six or seven years of age go upon the breeding grounds. You will remember that the seals are killed on the island up to the age of five or six years. After that they go upon the breeding grounds.

Then, soon after giving birth to her young the cow goes out to sea in search of food, I will read briefly from the United States Case upon that, because the distance to which the cow goes for food may be an important element of consideration. Perhaps the learned members of the high Tribunal will remember that Mr. Carter adverted to the remedies suggested by the British Commissioners for the exhaustion — the threatened exhaustion — of the race and it appears that these gentlemen thought they were making a valuable suggestion when they said that there might be a protected zone of twenty miles, subject to a gradual increase upon the United States agreeing to suspend the killing or to limit it by ten thousand. It is important to note how far the cows go out to feed for two reasons : In the first place to note how likely it is that the pelagic sealers will find a nursing cow when they are outside of 20, 30, 40 or a hundred miles ; because that is a most material consideration ; and in the second place to determine whether the suggestion of a twenty mile zone deserves even passing attention.

Now I read from the Case, page 115.

Necessarily after a few days of nursing her pup the cow is compelled to seek food in order to provide sufficient nourishment for her offspring. Soon after coition she leaves the pup on the rookery and goes into the sea, and as the pup gets older and stronger these excursions lengthen accordingly until she is sometimes absent from the rookeries for a week at a time.

This is what the learned President spoke of as the process of weaning. It is gradual.

The food of all classes of fur-seals consists of squids, fishes, crustaceans, and mollusks, but squids seem to be their principal diet, showing the seals are surface feeders. On account of the number of seals on the islands fish are very scarce in the neighboring waters ; this necessitates the cow going many miles in search of her food.

And now is the important statement as to the distances :

They undoubtedly go often from one hundred to two hundred miles from the rookeries on these feeding excursions. This fact is borne out by the testimony of many experienced sealers, who have taken nursing females a hundred miles and

over from the islands, and Capt. Olsen, of the steam schooner *Anna Beck*, states through the *Victoria Daily Colonist*, of August 6, 1887 (which is published in the *British Blue Book*, 1890, C-6131, p. 84), that anyone who knows anything of sealing is aware that such a charge (catching seals in Alaskan waters within three leagues of the shore) is ridiculous, as we never look for seals within twenty miles of shore.

This may explain why that twenty mile zone was adopted by the Commissioners :

They are caught all the way from between twenty and one hundred and fifty miles off the land. Capt. Dyer, of the seized sealing schooner *Alfred Adams*, confirmed the above statement.

The Tribunal thereupon adjourned until Friday, May 5, at 11 : 30 a. m.

EIGHTEENTH DAY, MAY 5TH, 1893.

Mr Coudert. — I propose, with the permission of the learned President and the Court, to resume the reading of extracts from the United States' Case on page 115. The extracts that I shall read are on very important topics, and the statements are very clear and very terse. This is now as to the habits of the cows and the excursions that they make when they are feeding and so on.

Necessarily after a few days of nursing her pup the cow is compelled to seek food in order to provide sufficient nourishment for her offspring. Soon after coition she leaves the pup on the rookery and goes into the sea, and as the pup gets older and stronger these excursions lengthen accordingly until she is sometimes absent from the rookeries for a week at a time.

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The distance that the seals wander from the islands during the summer in their search for food is clearly shown by the "Seal Chart" compiled from the observ

ations of the American cruisers during their cruises in Behring Sea in July, August and September, 1891.

That Chart will be found in the volume of portfolios and maps.

The great distance of the feeding grounds from the islands is not remarkable, as the seals are very rapid swimmers and possess great endurance. Thomas Mowat Esquire, inspector of fisheries for British Columbia, in the annual report of the Department of Fisheries of the Dominion of Canada (1886), at page 267, makes the following statement, which corroborates the foregoing Captain Donald Mc Lean, one of our most successful sealing captains, and one of the first to enter into the business of tracking seals from California to Behring Sea, informs me he has known bands of seals to travel one hundred to two hundred miles a day, feeding and sleeping during a portion of this time. Captain Bryant, with long experience as master mariner of a whaling vessel, states that he is convinced that a seal can swim more rapidly than any species of fish, and that a female could leave the islands, go to the fishing grounds a hundred miles distant and easily return the same day. But in case these excursions consumed a longer time, the peculiar physical economy of the pup seal makes it possible for it to exist several days without nourishment.

Now let me, before passing to any other subject, call the attention of the Court to the enormous amount of valuable information contained in those few brief extracts, and to assure the Court as the Court may readily satisfy itself, that every one of these statements is substantiated not only on its face, as I have shown, but also by a large mass of independent testimony and that it is impossible to discredit it and you have most important facts bearing on some of the vital questions in the case. You will understand now how it is that these nursing mothers are killed 150 miles from the land, or even more, as they are full of milk, and how it is that the unfortunate pups at home are killed by starvation. You will also understand that it is difficult for the Counsel of the United States to speak with becoming patience of the scheme proposed by the British Commissioners when they want to make a protective zone of 20 miles about the islands when it is manifest that it is absolutely useless, that the destructive process only begins beyond that line and that it is simply under the semblance of granting something, extending the privileges of pelagic sealing. You will certainly find that no pelagic sealer, however zealous in the practice of his so-called industry will object to that scheme. He does not come within the 20 miles nor catch any seals. The facts stated here that there is this large number of seals constantly upon the land, explains the scarcity of fish, and it is also apparent that there are feeding grounds, that is, places where enormous masses of fish congregate and where the seals go.

That is, of course, only female seals, because the males, the bulls, never leave the islands. The young animals stay around the islands, disporting themselves in the water and getting such food as they may, but the mothers, under the strong impetus of nature's law which tells them that they must feed their young by feeding themselves, first go with their enormous facilities of locomotion, — I might say unparalleled facilities of locomotion, — to these feeding grounds which they know, and there, of

course, they are slaughtered. Hence the enormous preponderance of pelagic destruction among the females.

The President. — Is there any evidence that those feeding grounds are known—that they are located in some particular place?

Mr Coudert. — There is this evidence, as stated in the book, that there are feeding grounds, that the seals congregate there; they are found in great masses there, and collect in great masses.

The President. — Are they certain points which are known, and of which the latitude and longitude may be described?

Mr Coudert. — Of course, it is difficult to fix it exactly on the sea, but they say, and the evidence is abundant, that there are feeding grounds 60 miles and 100 miles from the islands, to which these mother seals resort in great numbers, and, of course, they are pursued there and slaughtered.

Sir Charles Russell. — Will my learned friend point to any evidence that locates these feeding grounds?

Mr Coudert. — I cannot locate them, but I say that there is testimony the feeding grounds are 60 miles and 100 miles off.

Senator Morgan. — I understand the testimony to show that the feeding grounds change, that the fishes congregate at one place one year, and at another place another year.

Mr Coudert. — And that they are at great distances from the island, the seals congregate and are found there in great numbers, and it is the only way in which you can explain it. There is nothing else.

The President. — Do you think those feeding grounds might be excepted by establishing a zone?

Mr Coudert. — No, they are too variable. Of course, they change.

The President. — That was the purport of the question of my learned friend.

Mr Coudert. — They change, and it is stated in the case that there are feeding grounds to which these animals resort at a great distance from the islands and it is a mockery to talk of restricting the zone to 20 miles.

The President. — I would like to ask if there is any evidence that these seals met at such a distance from the Pribilof Islands are always seals wandering from the islands or may they be seals swarming towards the islands.

Mr Coudert. — No, they are our seals. That is conceded in this way: the British Commissioners themselves say (and, as I have said, the value of a concession from them is enormous — I conceive it to be more valuable than one from my learned friend, Sir Charles Russell) — they say, certain females in milk are caught at great distances and therefore, presumably, from the Pribilof Islands. There is no pretence that there are any others there, and it is a fact in the case (I am not talking now of disputed facts) that all these seals there at some time during the year land and live and stay there; and when they go, they always go with the *animus revertendi*. The *animus revertendi* exists in their minds and, I was

going to say, in spirit, if they have any — I do not know if they have any or not — I think Origen thought they had — but it always exists when they go for a day or when they go for a season. When the mother goes off she stays sometimes a week and comes back to feed her young; and the vitality of this animal is so great that the young pup can remain after a few days or weeks, when he has acquired some strength, sometimes, without food.

The President. — Will you be kind enough to remind me again what is the distance from the Pribyloff Islands to the Alaskan continent?

Mr Coudert. — A little more over 200 miles and it is 400 or 500 to Russia the other side.

Sir Charles Russell. — The nearest land is between two or three hundred miles away.

Mr Coudert. — To America that is the nearest land.

Sir Charles Russell. — The learned President was asking about the nearest land.

Mr Coudert. — He asked the distance to Alaska.

The President. — I meant to the continent.

Mr Coudert. — It is over 200 miles. Sir Charles Russell says it is between two and three hundred miles.

The President. — With regard to these feeding grounds, is it known whether they are more on one side than on the other side of the Pribilof Islands? Are they towards Russia or America — do you know about that?

Lord Hannen. — I think you will find that 182 miles is the distance from the islands to the nearest part of the Aleutian chain.

Sir Richard Webster. — The President spoke of the continent, my Lord.

The President. — The continent is the nearest part.

Lord Hannen. — No, I think you will find that is the nearest. [Indicating].

Mr Coudert. — With regard to the question the learned President asked, of course they vary. There are schools of cod fish, but they are mostly south and west of the Pribilof Islands, as I understand.

The President. — The pelagic sealing goes on on the west of the Islands quite as much as between the islands and the continent.

Mr Coudert. — Yes.

The President. — It goes on all round.

Mr Coudert. — I will call, a little later on, the attention of the Court to a chart on that subject. I would prefer to wait until I reach that point in the case. The nearest land is within 200 miles.

Mr Gram. — Are there not a great quantity of fish near to the Pribyloff Islands?

Mr Coudert. — No, Sir; it may be that they have come there, but there is a large number of seals, and they naturally would be driven off or destroyed. But the evidence is clear upon that, Mr Arbitrator, that the

great destruction of the seals is at a remote distance; some of the witnesses that I shall call attention to, on the other side, state that themselves, and, in fact, I have read from the testimony on the other side here, that nobody who knows anything about sealing will pretend that they get seals within those short distances. But I feel justified in calling the attention of the Court most specially to what I have read, because it is a foundation upon which much of this case rests — the habits of the mother seal; and there is no doubt (and if there were any doubt we should soon remove it by the testimony that I shall read) that a great part of the great destruction comes from the nursing mother. I, perhaps, do not attach as much importance to that as some persons might, because I think the great and the radical crime — it is a crime we think — is to kill females at all. The female that is killed under pretence or with the justification that it is not in that condition to day, if it is young and healthy will be in that condition to-morrow. It is the possibility — the more than possibility — the certainty that you introduce death by wholesale. Now, of course, it is more appalling to our sense of humanity. It is something that all the legislation of every country here represented reprobates and condemns, that a female in that condition should be killed, and therefore it makes the point stronger. It aggravates the offence, and it arouses the indignation more clearly when it is shown that these animals, nursing their offspring, are killed at that time. But I say the crime is to kill them at any stage; and where our system is preeminently good, and wherein it has been preeminently successful, is that that has been the distinctive mark of it — that under no circumstances would the killing of a female be allowed; and it is because that was adopted by Russia, and because that was kept up by America, that you are here to day. If it had not been there would have been no seals to trouble you about, or to occupy your attention. May I ask the Arbitrators to note — I shall not call special attention to it now — that in the first volume of our Appendix there are some valuable, and interesting charts, which speak for themselves, and which give information about which there can be no dispute. In volume I of the Appendix to the case of the United States, there are several charts between pages 542 and 543.

These are the charts showing where these vessels were seized by our cruisers and made to produce their log books.

This gives official information and it would take a great deal of time for me to read them or to study them before the Court; but if the Court has any doubt in its mind about the truth of the statement in the case which sums up the whole situation, it should be found in those charts — may I take the liberty of suggesting that the learned President is not looking at one of the charts I call attention to — it is a valuable one, but it is a table of vessels. Besides that we have the charts showing the localities in which the vessels were seized. There are several between the two pages that I mentioned.

General Foster. — Page 574 is one of the most descriptive.

Mr Coudert. — Nothing can be more conclusive than that because the localities where the seals were taken are pointed out, from day to day, from the logs.

The President. — It seems mostly between the Pribilof Islands and the Aleutian chain.

Mr Coudert. — Towards the South and West.

Sir Charles Russell. — The South and West, I think you mean?

Mr Coudert. — South, South-east, and South-west, are the principal localities or directions in which these vessels are found.

That of course only represents the few vessels that were actually seized. The Tribunal will understand that these maps are made from materials furnished by the sealing vessels themselves — that these data are taken from the log books of these vessels.

The President. — Mr Coudert, you will observe that these maps are not quite conclusive and complete as to the locality — the places — where the seals have been taken, because as my learned colleague Mr Justice Harlan suggests the places where the sealing vessels have been seized upon or where they have cruised is mostly indicated as lying between the Pribilof Islands and the Aleutian chain, that is to say, in the very route of the herds, as swimming towards the Pribilof Islands.

Mr Justice Harlan. — They might have been swimming away from the islands.

The President. — Yes.

Mr Coudert. — But they had all gone to the islands before that. They run up in April, May and June.

The President. — The seizures are more important than the place where they are made.

Mr Justice Harlan. — Mr Coudert means to say as I understand it, that taking the date and the place together it proves that at a given distance from the island, ascertained from these logs, seals were taken in milk.

Mr Coudert. — Yes.

Mr Justice Harlan. — And therefore the seals had travelled that long distance from the island while pups were on the land.

Mr Coudert. — Yes.

Sir Charles Russell. — Will my learned friend point to any evidence showing that, because these dates are all given and they are in July and August. The herd, as my friend calls breaks up in July.

Mr Justice Harlan. — I did not so understand it.

Sir Charles Russell. — It begins to break up in July.

The President. — The question is whether these seals are in process of migration, or whether they are merely wandering with the spirit to return again to the islands. That is what we want to make quite clear.

Mr Justice Harlan. — The question Mr Coudert was discussing was as to whether seals in milk were taken at a long distance from the Islands.

Sir Charles Russell. — Yes; but these charts do not show that at all.

Mr Justice Harlan. — Do not these charts show where the seizures took place?

Sir Charles Russell. — Yes, but not the place y takins of the cows in milk.

Mr Justice Harlan. — No. Mr Coudert is arguing from locality and time, because he had before that argued that according to all the proof, the seals had passed that point and reached the Pribilof Islands before August, and therefore when they were found in August round there, it meant that the seals had left the Pribilof Islands before August. I am not speaking of the soundness of the argument, but simply indicating what I understood.

Sir Charles Russell. — I am merely pointing out that the chart does not indicate that cows were taken at all, still less that they were cows in milk.

Mr Justice Harlan. — The chart would not indicate that.

Mr Coudert. — Of course, the chart does not indicate that. A chart is not intended to indicate that.

Sir Charles Russell. — No.

Mr Coudert. — If the Counsel will have patience with me, I will bind all these things up in a sheaf, if I can; but as Horace tells us, if I want to pull a horse's tail out, I must do it hair by hair. This is a hair, and if I can pull it out, then I have made some progress, but I cannot get at it otherwise.

Now with regard to the observation of the learned President, we have fixed the time and fixed the migration routes. If these are taken in milk, they must have reached the islands and left it. Now it follows from the evidence already in the case, and from the evidence that we shall produce, that when the animals go north, the cows are pregnant. Their great haste is to reach the land. Reaching the land is life; failing to reach in time is death. As I said yesterday, the temporary and accidental obstruction for a few days of ice, if they are late in the season, caused an enormous mortality, for the reason that the pups were dropped into the sea and drowned. I am glad to have the opportunity to make this statement now, for it will explain much as to which there appears to be (and really in fact is not) any discrepancy. They say — many of these men — “ We never catch seals in pup in the Behring Sea. ” Of course, they do not — it must be very rare indeed. They pursue them in pup and slaughter them as they go up towards the Pribyloff Islands. Those that they catch there are in pup.

General Foster. — In the North Pacific?

Mr Coudert. — In the North Pacific. After they have landed and established themselves at home and have dropped their pup (and they have but one function and one desire, which is to nurse the pup), they then go off, as I have stated, and they are caught in milk. All those females that are caught there—the breeding females—are in milk; those that are caught before they reach the islands are in pup. You will find that very important to bear in mind, and I am glad the learned President made the suggestion which called forth this explanation from me.

Mr Justice Harlan. — When you speak of those caught on their way to the land, you are referring, are you not, to those caught south of the Aleutian Islands?

Mr Coudert. — Yes, in the North Pacific.

Mr Phelps. — Perhaps you would ask the learned President to look at this chart.

The President. — Which is that?

Mr Coudert. — It is chart No 6 which Mr Phelps has pointed out to me in the American case.

Sir Charles Russell. — At what page is it referred to in the Counter-Case?

The President. — It is slightly more satisfactory than the other maps, because it shows that some of the seals cannot be mistaken as being on the migration route — that was the point of my question. Those on the south between St. Paul and the Aleutian chain being on the right, they might be taken for migrating seals — either migrating towards the islands or from the islands.

Sir Richard Webster. — Which chart is it?

Mr Coudert. — No 6 of the Counter Case. What I want to call the attention of the learned President to, is the dates. Now would you, Mr President, look up the extreme North-west there?

The President. — Yes, that is more significant I think.

Mr Coudert. — The dates are August 11th August 11th August 21th July 29th and August 3th and so on.

I would also ask the Tribunal, at its convenience, to study another map that Mr Phelps requests me to submit as being an important one. It is the Track Chart of the United States' Naval Officers in Behring Sea; and it will show how thoroughly the affair has been gone into, and how complete the investigation has been.

Mr Justice Harlan. — What is the number of the map?

Mr Coudert. — The Counter-Case, Chart No 4.

Senator Morgan. — How many vessels, do you recollect, were engaged in that work there?

Mr Coudert. — Seven.

Senator Morgan. — Under the command of a Naval Officer?

Mr Coudert. — Yes; under Commander Evans, who commanded the force.

Lord Hannen. — Can you refer me to the evidence relating to this map, Chart No 6 of the Counter-Case? Is there any evidence relating to it, do you know?

Mr Coudert. — To show its authenticity?

Lord Hannen. — No; not to show its authenticity, but to see what it is about?

Mr Coudert. — I do not know that anything can be said about it beyond what it shows for itself.

Lord Hannen. — Then I must say that I cannot count these things, which I suppose represent seals.

Mr Coudert. — No ; this is intended to show the track pursued.

Lord Hannen. — I am speaking of the first map.

Mr Coudert. — I was speaking of the other.

Mr Phelps. — There is evidence of that. Every fact is perfectly proved.

Lord Hannen. — Quite so. I only want to be referred to it, so that I may look at it.

Mr Coudert. — That evidence I will call attention to later on, if I may ; but I understood that Lord Hannen's question was directed simply to the Track Map. I understand it now.

Sir Charles Russell. — No 6 is Entitled " Seals observed " simply.

The President. — How many seals were observed, and at what season ?

Mr Coudert. — I shall give the Tribunal some testimony on that, of course ; as I say, I have to take it step by step.

The President. — Well, we have perhaps disturbed a little the order of your argument.

Mr Coudert. — I do not mind that at all, Sir. As I said yesterday, when the Court shows an interest in the argument, I am satisfied ; but there are some matters of detail connected with the maps which require some aid and authority from the books.

Lord Hannen. — That is what I meant.

Mr Coudert. — I pass now from that subject. I was speaking of begging the Court to bear in mind the facts I have given as to the distances that the cows go and those other subjects ; but I propose now to read, with the permission of the Tribunal, from page 147 of our Case.

I may say first, in regard to the control and domestication of the seal, of course everything that touches the nature of the seal is important here ; and I would ask the permission of the Court to state, for the information of the Court and also that my learned friends may know as they have asked, what evidence we had on this subject. The evidence on the subject of these Charts will be found in the Counter-Case of the United States and its Appendix, page 207. I think it begins ; and you will also find it at 219, 237, and 401 and following pages. I may produce other evidence on that as well.

Now, perhaps it might be convenient to the Court, though it is somewhat out of the regular order of my argument, to call attention, in connection with this, to the testimony of Charles H. Townsend, a naturalist on board of one of these ships. He was with Captain Hooper, and it is in the Counter-Case of the United States, page 394. You will find a photograph attached to it.

Senator Morgan. — That is one of the ships that Commander Evans had in his fleet ?

Mr Coudert. — No ; it was the " Corwin ", Captain Hooper ; and on page 394, you will note that Mr Townsend says.

Annexed to the report of Captain Hooper is a table giving the results of the examination of forty-one seals which were killed in Behring Sea in 1892. It appears

that of this number twenty-two were nursing seals. The photographs hereto annexed show exactly the way all of these nursing female seals looked when cut open on the deck of the *Corwin*.

The upper photograph, the one annexed to page 394 to which I call the attention of the Court, shows how they looked when they were killed; and you can see the milk that has been streaming on and is accumulated on the deck. The photographs, he says, especially the first one, exhibit the milk streaming from the glands on the deck. I mention that incidentally; I had intended to speak of Captain Hooper's expedition and his experience; and I shall refer to it more in detail hereafter; but, with the permission of the Court, I will now resume the regular thread of my argument and the statement of evidence.

I stated yesterday something about the character of the seal, and how near a domestic animal the seal was, even conceding, which I do not concede, that it is improper to call it a domestic animal. Whether it is or not a domestic animal and entitled to that appellation must depend, of course, upon its nature and its habits, and, as there seems to be an issue between us as to the real nature of the seal, and it is one of the few points I think upon which there is, perhaps, a real issue, it will be well to call the attention of the learned Tribunal to the position taken by the United States and to the evidence in support of it. I shall, therefore, read from page 147 of the United States' Case.

The peculiar nature and fixed habits of the seal make it an animal most easy of control and management. A herd of seals is as capable of being driven, separated, and counted as a herd of cattle on the plains.

I think that is an understatement from what I have read about the cattle on the plains. It is easier to control the seals; but I do not stop to dwell on that.

In fact, they much resemble these latter in the timidity of the females and the ferocity of the males. One example of the ease with which they can be controlled is mentioned by Mr Falconer, who speaks of a herd of three thousand bachelor seals being left in charge of a boy after they had been [driven] a [short distance] from the hauling grounds.

Then.

Mr Henry N. Clark who was for six years, that is, from 1884 to 1889, in the employ of the Alaska Commercial Company and in charge of the sealing gang on St George Island, and who is therefore especially competent to speak of the possibilities of driving and handling the seals, says. I was reared on a farm and have been familiar from boy-hood with the breeding of domestic animals, and particularly with the rearing and management of young animals, hence the comparison of the young seals with the young of our common domestic species is most natural. From my experience with both I am able to declare positively that it is easier to manage and handle young seals than calves or lambs. Large numbers of the former are customarily driven up in the fall by the natives to kill a certain number for food, and all could be rounded up as the prairie cattle are if there was any need for doing so. All the herd so driven are lifted up one by one and examined as to sex, and while in this position each could be branded or marked if necessary. If the

seal rookeries were my personal property I should regard the task of branding all the young as no more difficult or onerous than the branding of all my calves if I were engaged in breeding cattle upon the prairies.

The testimony as to this is found in volume 5 as is noted here.

The foregoing statement as to the possibility of branding the young seals is supported by others equally experienced in seal life in the islands. Dr Mc Intyre so long experienced in the handling of seals, says that they are as controllable and amenable to good management upon the islands as sheep and cattle, and several other witnesses make like affirmations. Chief Anton Melovedoff, already mentioned.

He is one of those who has the most experience and knowledge on the subject,

states that it is usually supposed that seals are like wild animals. That is not so. They are used to the natives and will not run from them. The little pups will come to them, and even in the fall, when they are older, we can take them up in our hands and see whether they are males or females. We can drive the seals about in little or large bands just as we want them to go, and they are easy to manage. Several other Pribilof islanders and white men long resident there make similar statements.

This peculiar susceptibility to control has also been and is recognised by such a well-known scientist as Dr E. von Middendorff, of Russia, who, in a letter dated May 6/18, 1892, says. "This animal is of commercial importance and was created for a domestic animal,

my learned friends on the other side, I am glad to see, think there is something humorous about this, so I will read it again.

"This animal is of commercial importance and was created for a domestic animal, as I pointed out many years ago,"

as we shall show by other evidence.

The President. — Are you aware that the branding of the seals has ever been practically used.

Mr Coudert. — I presume not, why should it be? If we are dealing with a lawless band of men on the high seas, who say that the freedom of the seas do not permit us to use our property, how would branding help that?

The President. — Would it be practicable, that is what I want to know.

Mr Coudert. — I think so. Why not. We take them in our arms, examine them and handle them, therefore why not brand them, but what good would it do. On the prairie, when a man does the thing that these people are doing, he is hung on a tree without a judge or a jury, because the necessity compels them to do it. They cannot go round for a justice of the peace, three or four hundred miles off, and say, "This man has stolen my cattle, notwithstanding the brand", and self-protection comes in but how would it help us. They cut the ears, in some instances, of the pups and the next year they found the pups with the same ears. That is a proposition that my learned friends will not dispute. "This power of domestication has made it possible to discriminate carefully".

Sir Charles Russell. — Will you read the last sentence, because it was that which rather amused me. It begins "It is in fact".

Mr Coudert. — Yes, I will.

It is in fact the most useful of all domestic animals, since it requires no care, and no expense, and consequently yields the largest net profit.

When this was written probably it was written before this naturalist knew pelagic sealers had put us to a great deal of expense. To that extent he is inaccurate.

This power of domestication.

our case goes on to say

has made it possible to discriminate most carefully between the classes of seals killed, and to enforce rules and regulations for the general management of the herd. Rear Admiral Sir M. Culme Seymour, in a despatch to the British Admiralty says : — The seals killed by the Alaska Commercial Company are all clubbed on land, where the difference of sex can easily be seen.

Now so long as they are on the land, and this goes on, what difference is there, — what difference can be alleged between those and domestic animals, if you take the old expression — the old distinction between *feræ naturæ* and *domitæ naturæ*, that is a nature that is controlled and reduced to subjection by man, are not these animals *domitæ naturæ*? They will come to man, they will be fondled and handled by man, they will be driven by man, they will be enclosed by man in such district as he may choose.

Senator Morgan. — In point of domestication in what do they differ from swine, which are not useful for any purposes of domestic employment, and are used only for food, and yet are domestic animals?

Mr Coudert. — They are practically like swine in that way, and they are also like calves. The flesh is eaten and resembles the veal as compared with the older animals, and the pelt is extremely valuable. We do not make hogs work. We raise them because of the food they furnish and because their skin is valuable in commerce. I confess my utter inability to see, during that period, while the case is not complicated, if it be complicated by resorting to a sea to get food instead of to a prairie to get grass, there is any difference whatever, and why, unless we are fettered by ancient prejudices and old ignorance we should not say that is a domesticated animal, that is an animal of a conquered nature, *domitæ naturæ*.

Now, nobody can doubt, if we could put them to some useful purpose of work, that it could be readily done, but they are useless as far as we know, to-day, for any such purpose. It may be in the development of time, but when it comes to hypothesis and conjecture, then I leave the British Commissioners to open the door. Therefore, when I stated yesterday that these were practically domestic animals, my statement, at least, is supported by reason, and by the testimony of wiser men than myself.

Now a most important question comes up in one sense, and an utterly irrelevant one in the other. That is the question of management on

the islands. That question, so far as the judgment of this Tribunal is concerned, in its general aspect is entirely irrelevant. The management of this herd is our affair. It is the exclusive affair of the United States; and neither Great Britain nor France, nor any of the countries here represented, would willingly tolerate, much less encourage, any interference with its home affairs, and the management of that herd upon those islands. While that herd is there we submit it is just as much and exclusively within our control, and our right of control as if they were so many calves or swine.

Senator Morgan. — Do you find any power in this Treaty for this Arbitration, to deal with the question?

Mr Coudert. — No. I was coming to that. Not only no power, but an exclusion which is stronger than a mere negative argument. The Treaty says that you shall not, and Great Britain would be the last nation in the world to permit a foreign *ingérence*, I will call it because it is an untranslatable word — for lack of a better I would say “interference” — but any *immixtion*, to borrow another French word, into its domestic affairs, and it would say to the whole world. This is our herd. It is our property. It is our property at sea and upon land. You dispute our title upon sea. We yield for a moment, and go to the peaceful methods of arbitration rather than to the brutal methods of war; but nobody disputes our right to manage these animals as we please upon the land. The land is ours, and everything that is there is ours. From the lowest depth below *usque ad cælum* it is ours; and Great Britain would not permit, although any jurisdiction of hers was most remotely concerned, that any such question should be put.

When the Government of Her Majesty instructed the British Commissioners, that Government gave them careful notice that they must not interfere, and my position now is before this Tribunal with all respect, and unfeigned respect, that so far as the management is concerned of our Islands, — as management — it is entirely outside this case and outside the jurisdiction of this Court. In one aspect of the case, to which I shall presently allude, it may be important to consider it but so far as Regulations are concerned, I would ask you to consider that it is outside entirely, that you must hold that this being our property, our interest being to protect it, our intelligence we may say being equal to the average of the rest of the world and the other Governments of the world (there is no issue as to that — even by the British Commissioners) we may be trusted to take care of our own property in the best possible manner. All I would ask you to look at is, in considering the destruction of this race now threatened with extermination, whether our methods in theory and in general practice are not calculated for conservation, and the other for destruction.

When you come to consider the cause of the destruction, then you may say if you choose to look into it, that bad management, if any has been proved, that bad system, if any, is alleged, may have contributed

to the alleged diminution by pelagic sealing; but so far as regulations are concerned, that is a matter absolutely within our own exclusive jurisdiction and right.

Lord Hannen. — Will you allow me to make an observation.

Mr Coudert. — I hope your Lordship will.

Lord Hannen. — Pray do not suppose it to show any leaning of my mind at all. I only want you to touch upon this question : Do you think that we could not make conditional Regulations ?

Mr Coudert. — I do.

Lord Hannen. — Conditional upon something done or not done upon the other side ?

Mr Coudert. — I do.

Lord Hannen. — Very well, that is all I wanted to know.

Mr Coudert. — I do. I think that is entirely outside. I think that this Tribunal should assume that, dealing with our own property, we will deal with it under the best conditions. What sort of Regulations would conditional ones be ? We should have to go into making a Treaty about it. This is a recommendation made by Lord Salisbury to the Commissioners — his instructions, and it is on page, vii of the British Commissioners' Report. It is fair to say the British Commissioners very properly looked into our methods of doing business, and I find no fault with them, and I think they will concede that every possible facility and courtesy was shown them, and everything was done that could be done to facilitate their task, because they must, as this Tribunal must, know all about the subject, and we are trying so to present the case that the Tribunal may know all about the subject :

You will observe says Lord Salisbury to the Commissioners, that it is intended that the Report of the Joint Commissioners shall embrace recommendations as to all measures that should be adopted for the preservation of seal life. For this purpose, it will be necessary to consider what Regulations may seem advisable, whether within the jurisdictional limits of the United States and Canada, or outside those limits. The Regulations which the Commissioners may recommend for adoption within the respective jurisdictions of the two countries will, of course, be matter for the consideration of the respective Governments, while the Regulations affecting waters outside the territorial limits will have to be considered under clause 6 of the Arbitration Agreement in the event of a decision being given by the Arbitrators against the claim of exclusive jurisdiction put forward on behalf of the United States.

There you see it is very plainly indicated. Diplomacy might still have gone on between the Governments. The Government of Her Majesty desired to know precisely what all the circumstances connected with seal life were and what the elements of this great destruction were, and therefore it says : “ Study the subject. ” So far as the jurisdiction is concerned on the high seas, that is a matter for the Arbitration, but where it is inside the jurisdiction limits that will, of course, be matter of consideration for the respective Governments, and it proceeds :

The Report is to be presented in the first instance to the two Governments for their consideration, and is subsequently to be laid by those Governments before

the Arbitrators to assist them in determining the more restricted question as to what, if any, Regulations are essential for the protection of the fur-bearing seals outside the territorial jurisdiction of the two countries.

In other words, outside the territorial jurisdiction of the countries we stand on the same footing as Great Britain, we have the same rights as Great Britain to make Regulations to protect this animal outside, and if the United States are incompetent at home to take care of their own for the United States never meant that its right to make laws for its own country should be given up to anyone.

Now, with this as a preface, I go on to examine the question of the management on the Islands. It may be well, in advance, to say what we consider to be the prime conditions of difference between the systems on the Islands and pelagic sealing, that is sealing on the high seas. It is that, in the one, discrimination is possible, and, in the other, discrimination, by the very nature of things, is impossible. The British Commissioners have stated, and they have truly stated, on this subject of discrimination that it was absolutely impossible, and have illustrated it in this way.— That it is as unreasonable to ask a pelagic sealer to discriminate as to the sex of the seal that he kills as for a fisherman to discriminate as to the sex of the fish that he catches on his hook. From the very nature of things, he cannot do it. Examination comes too late.

It follows death. It is a *post mortem* examination, of necessity, and cannot be anything else. There is the great distinction. Whereas on the Islands an intelligent system, pursuing the laws of nature, will enable men to discriminate, and will preserve the flock. That is the reason from the beginning, — away back into the time of the Russian occupation, when it was discovered, for it was only by experience that it was discovered, that a deadly wound was being inflicted upon the property (that is, the herd) by promiscuous killing. The Russians came to the conclusion that they must discriminate as to sex and kill only the young males.

That has been carried on by the United States with improved methods, as we shall show. It is a reasonable system; it is declared by our Adversaries to be an admirable system; to be perfect in its theory, and we claim it to be as nearly perfect in its administration as anything committed to fallible human hands can be. Of course, it is not adapted to pelagic sealing; and in all schemes that are proposed, they all come back to this, and founder upon that rock : — “Discrimination is impossible except on the Islands.” I need hardly argue that if there is no discrimination, there must be destruction. This is an expanding business. It has been a most profitable one; the number of ships has increased enormously, and if is thrown open or kept open to pelagic sealing, there being no discrimination, females being largely predominant in the catches, the result shows, and no argument is necessary to show it because it is merely a conclusion of ordinary experience and common sense, it must lead to extinction.

I will read a short statement from our Case on this page 152 :

The class of seals allowed to be killed are the non-breeding males from one to five years of age which haul out upon the hauling grounds remote from the breeding grounds. The handling of this class of seals because of their separation from the breeders causes the least possible disturbance to the seals on the breeding grounds.

Your Honours may remember that yesterday I called attention to the distinction on the land, — the different homes that these animals had adopted, the old bulls going first on certain parts of the rookeries, the cows following, and the young ones taking a different locality, — a different district on the Islands; so that when you take the young males you do not disturb the breeding-grounds at all; and it is very important they should not be disturbed. Great precautions are taken; as, for instance, not a dog is allowed on the Islands, lest his barking should disturb the seals; and I believe they even go so far as to prevent smoking; — at any rate, if the seals sense of smell is as keen as the British Commissioners make out, they ought to stop smoking.

Lord Hannen. — Is it not that they forbid lighting fires because of the smoke? They do not forbid smoking, do they?

Mr Coudert. — Well, my impression is that smoking near the breeding grounds is interdicted :

The handling of this class of seals because of their separation from the breeders causes the least possible disturbance to the seals on the breeding grounds.

And the evidence will show that the utmost care and the greatest precautions are taken to prevent that disturbance.

Then on the next page :

The number of seals allowed to be killed annually by the lessees was, from 1871 to 1889 inclusive, 100 000.

That is under the first lease.

But this number is variable, and entirely within the control of the Treasury Department of the United States.

This has already appeared from the argument of Mr Carter. The Government of the United States will not even fix this as an amount which may be killed but reserves to itself the right, with an intelligent supervision, to determine if the 100 000 shall be reduced or not.

Senator Morgan. — 100 000 is the maximum limit, I understand.

Mr Coudert. — Yes, no more than 100 000, but the Secretary of the Treasury may reduce it as much as he thinks fit.

In 1889 Charles J. Goff, then the Government agent on the islands, reported to the Department that he considered it necessary to reduce the quota of skins to be taken in 1890. The Government at once reduced the number to 60 000 and ordered the killing of seals to cease on July 20th.

My friend, Mr Williams, reminds me as a matter of fact they only killed 20 000. And now we must be taught by our enemies, and I will read

from the British Commissioners Report, page 114, section 660, with the permission of the court.

Theoretically, and apart from this question of number and other matters incidental to the actual working of the methods employed, these were exceedingly proper and well conceived to insure a large continual annual output of skins from the breeding islands, always under the supposition that the lessees of these islands could have no competitors in the North Pacific.

I will ask, at this point, to have the Arbitrators stop and look at the statement. An admirably devised system, one that would have preserved the seal and insured an out-put constant, unfailing, and regular if we had taken into account pelagic sealing.

It was assumed that equal or proximately equal numbers of males and females were born, that these were subject to equal losses by death or accident, and that in consequence of the polygamons habits of the fur-seals, a large number of males of any given merchantable age might be slaughtered each year without seriously, or at all interfering with the advantageous proportion of males remaining for breeding purposes.

I think we will all agree that that was a fair and intelligible assumption. Now the next paragraph I will read — 661.

The existence of the breeding rookeries as distinct from the hauling-grounds of the young males, or *holluschickie*, was supposed to admit, and did in former years to a great extent admit, of these young males being killed without disturbing the breeding animals. The young seals thus 'hauling' apart from the actual breeding grounds were surrounded by natives and driven off to some convenient place, where males of suitable size were clubbed to death, and from which the rejected animals were allowed to return to the sea.

The method is a blow on the head and the animals are very easily despatched. The bones of the skull seem to be very thin and it is a painless prompt and efficient method of putting them to death. The sportsmanlike instincts — the atavistic instincts of the British Commissioners rebel against this. Oh! they say, it is very brutal and it is not half so sportsmanlike as going round with a rifle and shooting-gun and a gaff and giving the animal a chance to escape. Well it is precisely what should not happen. You do not want the animal to escape, especially if it is to go with a wound in its body, to perish, and to be of no use to any human being. Our method, is not sportsmanlike and that is precisely its beauty — its convenience. These animals must be sacrificed for the good of mankind. Then the only question is how can you do that in the most humane way; and we think that a blow on the head, which kills them in the twinkling of an eye, is infinitely more humane than giving them a chance while you are pursuing them with a shot-gun and a spike.

There is no evidence, I think I can say this boldly and with perfect confidence, worthy of consideration, showing that, from 1870 down to the year 1888 or thereabouts, any decrease in the herd had taken place through such killing; on the contrary, the evidence shows that the herd had actually increased during those ten years, and it was only when this destruction on the sea began, with its inevitable accompani-

ment of permanent destruction, that they found on the islands that they were killing too many males; and the candid confession of the British Commissioners themselves explains it. The system was not adapted to pelagic sealing — to this growing industry — for which they wished to provide, not only to-day, but for its natural expansion, as they expressed it. So that you are called upon to make regulations not only to permit this slaughter that includes 80, 90 or 95 per cent of the females, but to cast an eye into the future and invoke a prophetic faculty. You must say : “ This is going to increase, and we must provide for the increase of pelagic sealing as well as for it in its present condition. ”

Now, in connexion with that, and in support of it, I want to read from the United States' Case, page 164 :

Under this careful management of the United States' Government, the seal herd on the Pribilof Islands increased in numbers, at least up to the year 1881. This increase was readily recognized by those located on the islands. Captain Bryant says that in 1877 the breeding-seals had increased to such an extent that they spread out on the sand beaches, while in 1870 they had been confined to the shores covered with broken rocks. Mr Falconer mentions the fact that in 1874 passages or lanes were left by the bulls through the breeding grounds, which he observed to be entirely closed up by breeding seals in 1876 and in this statement he is borne out by Dr Mc Intyre. It must be remembered that in this connection that two hundred and forty thousand male seals had been destroyed in 1868—

that, as I have already explained to the Court, was during the year when there was an interregnum, Russia retiring and the United States not appearing, then there was a slaughter of 240,000—

and that this increase took place in spite of that slaughter and although 100,000 male seals were taken annually upon the islands.

We thus have a system confessedly perfect in theory. I think it is also stated by the British Commissioners (to use their own language) that, from a transcendental point of view, it is an admirable system. It is admirable in theory; it is admirable transcendently. It was considered admirable in practice until pelagic sealing appeared before the world. Until that method of destruction became manifested and its results became evident, there was no difficulty whatever; and, as this is an important point, I will call the attention of the Court and my friends on the other side to the collated testimony on different subjects at page 260. It is practically an Appendix to our Argument.

There is the testimony of Mr Mc Intyre. I will not trouble the court to look at it; I will refer my friends to it. Mr Mc Intyre says :

That while located on the Pribylof Islands I was the greater part of that period upon the island of St. Paul; that during the twenty-one years upon the islands I examined at frequent intervals of time the breeding rookeries on said island of St. Paul, and now recollect the condition of said rookeries and the approximate area which each of them covered at different times during my experience on said islands.

He then goes on to state that he has drawn a chart from memory, which the court may look at. I am fully conscious that a chart drawn

from memory after many years is not so reliable as it might be, but it simply expresses, in that form, the best recollection of a reliable witness on the subject.

The next passage is also from Mr Mc Intyre's evidence page 45. I am reading from the same page of the Collated Testimony.

That from the year 1870 there was an expansion of the areas of the breeding grounds, and that in the year 1882 they were as large as at any time during my acquaintance with them.

It was only subsequent to that that the difficulty was found with regard to getting the males.

Now on page 267 of the Collated Testimony, Daniel Webster (and I, may perhaps remind the Court again that Daniel Webster is conceded to be a reliable, honest, and trustworthy witness), says :

My observation has been that there was an expansion of the rookeries from 1870 up to at least, 1879, which fact I attribute to the careful management of the Islands by the United States Government.

Twenty-four years of my life has been devoted to the sealing industry in all of its details as it is pursued upon the Pribilof Islands, and it is but natural that I should become deeply interested in the subject of seal life. My experience has been practical rather than theoretical. I have seen the herds grow and multiply under careful management until their numbers were millions, as was the case in 1880.

Now in connection with this, which is a very important subject not only in a practical, but in what our friends the British Commissioners call a transcendental point of view, this assault upon the management of the United States is one that we may well meet with abundant testimony if we had it, and we have.

Now in the Collated Testimony, the same book, page 257, there is the evidence of Mr Charles Bryant, one of the most experienced of them all who is constantly referred to, and constantly commented on, by the other side. He says :

I have examined the breeding areas of 1870, indicated by H. H. Mc Intyre on charts A. B. C. D. E. F. and G. of St Paul Island, and they are, to the best of my knowledge and belief correct. I have also examined the areas of increase shown by him on the same charts as applicable to the breeding rookeries of 1882, and, they are proportionately correct in 1877, the last year of my stay upon the islands, the increase up to that time having been about half of that shown by him. The above statement is true also to the best of my knowledge and belief, of the breeding areas of 1870, and the increase of 1882, indicated by Thomas F. Morgan upon charts H. I. J. and K. of St. George.

We then have this on page 260.

From 1870 to about 1884 the seal rookeries were always filled out to their limits and sometimes beyond them.

This witness is a priest of the Greek Church, General Foster reminds me, and I may say in connection with the testimony of this reverend gentleman that it is a matter about which he could not well be mistaken. It was not like counting. A man might say, " There are two millions, or

seven millions ”; and it might be neither, but an intermediate figure; but when he says that certain places were covered [this year that were not covered last year, of course as to that he could not be mistaken.

Now at page 263 we have the testimony of Mr John M. Morton. He says :

I have already stated that my personal observation and investigation of the condition at the islands from 1870 to 1878 inclusive, showed that during those years a steady expansion of the breeding rookeries took place. I am also informed and believe that such expansion continued up to the year 1882 or 1883. During this period of general increase it is notable that the destruction of animals from pelagic sealing was comparatively unimportant. But a few vessels up to this time had made predatory excursions in Behring Sea, and the number of seals obtained by them is known to have been small.

[The Tribunal then adjourned for a short time.]

Mr Coudert. — As I was saying to the Court at the hour of adjournment, the question of management on the Islands in one aspect of the case is important, and the question of increase or decrease is one that deserves consideration; our proposition is that the period from about 1880 to 1884 or 1885 was one of stagnation. From 1870 to 1880 it was one of increase. Of course it is not absolutely and mathematically possible to say when increase ceased and stagnation commenced and decrease took its place, but speaking generally and with such information as we can get from persons best able to express an opinion, that is the estimate that we submit to the Court. — Increase to 1880 : stagnation from 1880 to about 1884 : and subsequently to that, the decrease which it is conceded on all sides exists and now threatens extermination. After this latter date of 1884 or 1885, there was a perceptible decrease in the herd as a whole, although no difficulty was at that time experienced in getting the full quota of 100,000 young males, but when 1887 was reached or 1888 then the difficulty was first experienced, and of course it is almost unnecessary to say that those on the islands would first notice the decrease in that particular class of animals in which they were most specially interested, over which they had control, from which they took their supplies and with which they had the most to do. This is the statement in the case of the United States at page 165 :

From the year 1880 to the year 1884-1885 the condition of the rookeries showed neither increase nor decrease in the number of seals on the islands. In 1884 however, there was a perceptible decrease noticed in the seal herd at the islands and in 1885 the decrease was marked in the migrating herd as it passed up along the American coast, both by the Indian hunters along the coast and by white seal hunters at sea. Since that time the decrease has become more evident from year to year, both at the rookeries and in the waters of the Pacific and Behring Sea. The Behring Sea Commissioners of both Great Britain and the United States in their joint report, affirm that a decrease has taken place in the number of the seal herd so that the simple fact is accepted by both parties to this controversy. But the time when the seals commenced decreasing, the extent of such decrease, and its cause are matters for consideration.

This cause in one sense is also admitted by the joint report, and that is that the decrease is due to the interference of man — to the killing by man.

If we were to stop here, having shewn the court that so far back as 1876 pelagic sealing had commenced and was more or less murderous, only a few thousand it is true originally, but gradually growing up till 12,000 or 13,000 were reached, — about 1880 or 1879 it began to average some 12,000, — if we have shewn that up to that time the rookeries were prosperous and increasing, and suddenly came a tap, a drain, upon our resources in the form of pelagic sealing, and that many thousands were killed, and under such circumstances that the killing was peculiarly fatal to the integrity and increase of the flock, we would naturally think that we have no more to shew, the burthen is upon the other side. If I have a flock of sheep, and I can prove that for a number of years raiders have been at work, and they have carried off my ewes and lambs in large numbers, I am not called upon to shew that the animals died of murrain or sun-stroke : that I may well leave to my adversary to establish if he may. The natural and obvious conclusion from the fact of this large pelagic sealing, — for in its accumulative effects it was large — is to shew why the flock decreased. But we are not left only to this obvious and natural and necessary inference. We have the proof on that. The figures I have already to some extent given. They have appeared from my brother Carter's argument, and I also will give the Court a statement shewing, as far as may be, what the extent of pelagic sealing was from 1876 to 1884. But I ought to say now, so that the table will be understood and lest I should omit them, that we are unable to give an exact and satisfactory statement. Our friends on the other side are able to give us a statement of the Canadian sealers and the havoc done by them, because there is a regular table and account kept of that, but in addition there was a number of American ships engaged in the same business going on with the same methods of destruction and resulting of course in the partial deterioration of the flock beyond the immediate numbers killed.

Senator Morgan. — Do you mean the American ships were engaged in the Behring Sea, or outside of it?

Mr Coudert. — They were engaged outside of it at first from 1876, — we have no account of it; so that when the Court looks at the statement furnished by our learned friends as to the depredations committed by the Canadian sealers, that must be borne in mind, — that it is only an imperfect statement of the damage actually realised.

I resort, again, to Mr Mc Intyre. He was on these Islands most of this time; and I am going to read now from the collated testimony, page 277. That is the Appendix to the Argument.

Mr Justice Harlan. — The evidence there is in the same words as in the original volume.

Mr Coudert. — Yes; it is an abstract, but a literal abstract.

Mr Phelps. — It is really an extract.

Mr Coudert. — Yes, a literal extract.

That during the three years following 1882, namely 1883, 1884 and 1885, I was not upon the islands; that upon my return to said islands in 1886 I noticed a slight

shrinkage in the breeding areas but am unable to indicate the year of the period of my absence in which the decrease of breeding seals began; that from the year 1886 to 1889, inclusive, my observation was continuous and that there was a greater decrease of the seals for each succeeding year of that period, in a cumulative ratio proportionate to the number of seals killed by pelagic sealers.

In 1886 I again assumed personal direction of the work upon the islands, and continued in charge up to and including 1889. And now, for the first time in my experience, there was difficulty in securing such skins as we wanted.

That is in 1889.

The trouble was not particularly marked in 1886.

Mr Justice Harlan. — That was in 1886, I think.

The President. — From 1886 to 1889.

Mr Justice Harlan. — He says : “ And now, for the first time; ” that means, for the first time in 1886.

Mr Coudert. — Yes.

The trouble was not particularly marked in 1886, but increased from year to year to an alarming extent, until in 1889, in order to secure the full quota and at the same time turn back to the rookeries such breeding bulls as they seemed to absolutely need, we were forced to take fully 50 per cent. of animals under size, which ought to have been allowed one or two years more growth. Concerning this matter, I reported to the Alaska Commercial Company under date of July 16, 1889, as follows : “ The contrast between the present condition of seal life, and that of the first decade of the lease is so marked that the most inexperienced cannot fail to notice it.

Just when the change commenced, I am unable, from personal observation, to say, for as you will remember I was in ill health and unable to visit the islands in 1883, 1884 and 1885. I left the rookeries in 1882 in their fullest and best condition, and found them in 1886 already showing slight falling off, and experienced that year for the first time some difficulty in securing just the class of animals in every case that we desired. We, however, obtained the full catch in that and the two following years, finishing the work from the 24th to the 27th of July, but were obliged, particularly in 1888, to content ourselves with smaller skins than we had heretofore taken. This was in part due to the necessity of turning back to the rookeries many half-grown bulls, owing to the notable scarcity of breeding males. I should have been glad to have ordered them killed instead, but under your instructions to see that the best interests of the rookeries were conserved, thought best to reject them. The result of killing from year to year a large and increasing number of small animals is very apparent. We are simply drawing in advance upon the stock that should be kept over for another year's growth.

Then, in 1890, the quota was reduced to 20,000 and the new lease took effect in this year.

Sir Charles Russell. — “ 1890 ” does not appear there at all.

Senator Morgan. — Can you state exactly when the first *modus vivendi* took effect.

Mr Coudert. — 1891.

Senator Morgan. — What time of 1891.

Mr Coudert. — I think it was in June — June 15th 1891.

Senator Morgan. — It covered the fishing season of 1891.

Mr Coudert. — Yes.

Senator Morgan. — And the second one covered the fishing season of 1892 and 1893 to October next.

Mr Coudert. — Yes.

Senator Morgan. — Now during those two periods the take of the United States was confined to 7,500 seals.

Mr Coudert. — Yes, a somewhat larger number was killed.

Senator Morgan. — I remember.

Mr Coudert. — But it did not exceed 12,000.

Senator Morgan. — The *modus vivendi* confined the take on the part of the United States.

Mr Coudert. — Yes.

Senator Morgan. — Can you state how many seals were taken by the pelagic hunters in 1891.

Mr Coudert. — Yes, we have that to some extent. I am coming to those figures in a moment. I will give them as near as we are able to give them.

Senator Morgan. — For 1891 and 1892?

Mr Coudert. — Yes.

Senator Morgan. — I believe those figures run up to 60,000 or 70,000.

Mr Coudert. — Yes, I was going to say there were 68,000 in 1891.

Senator Morgan. — How many for 1892?

Mr Coudert. — We have not the figures : they are not compiled ; but the figures, as given by the other side, of the pelagic sealers in 1891 amount to 68,000 seals.

Senator Morgan. — That is to say, the pelagic hunters got 68,000 and the United States 7,500.

Mr Coudert. — Yes, a slightly larger number — about 5,000 more, owing to the dates overlapping.

Senator Morgan. — Is the same state of affairs existing now — is there any evidence on that subject ?

Mr Coudert. — I do not think we have any evidence as to that.

The President. — That is pelagic sealing outside ?

Senator Morgan. — Yes, the pelagic sealers got 68,000 and the United States 7,500.

The President. — On account of the *modus vivendi*.

Senator Morgan. — Yes, we were limited to 7,500 and the pelagic sealers got 68,000.

Mr Coudert. — And the next year, as far as we can get at the figure, it was 45,000, all outside the Behring Sea.

The President. — Inside have you any estimation ?

Mr Coudert. — No, they were interdicted.

The President. — But, in fact, they were there ?

Mr Coudert. — No, they did not come into our house ; they intercepted them before they got through the door. The report, General Foster says, is, that less than 500 were taken.

The President. — The seizures were effectual and prevented any sort of pelagic sealing inside.

Sir Charles Russell. — No, it was the result of the agreement under the *modus vivendi*.

The President. — But before the *modus vivendi* was agreed upon there was no pelagic sealing inside.

Sir Charles Russell. — Yes.

The President. — That is what I ask, what was the amount of pelagic sealing previous to the *modus vivendi*.

Mr Coudert. — I will ask the President to let me take the tables on that. I cannot take each year alone. We have tables prepared on that : I will submit them to the Tribunal in a few minutes.

I stated to the court from memory the efforts taken by suppressing noise and even smoking, to prevent a disturbance in the rookeries, and I think there is evidence on that very point. We have collated the testimony on the subject of pelagic sealing, and I will submit it to the high Court before the close of the argument.

The President. — You will tell us that in your own time. It is better perhaps not to interrupt you.

Mr Coudert. — Yes, I confess the carrying of figures from 1876 to 1892 in my memory without memoranda I find difficult, and possibly misleading.

The President. — I mean that, if you argue that the decrease is exclusively imputable to pelagic sealing, and give us proportionate figures for that decrease, you must also give us proportionate figures for the destruction by pelagic sealing — the destruction inside as well as outside, if any took place.

Mr Coudert. — Yes, you will understand that I give the general figures, and I stated at the out there was a small pelagic destruction which grew up to 12,000, and eventually to 60 000 ; and even when there was an average, if you please, of only 12,000, and those were entirely or (to a great extent, — say more than half, to put it at the least), — females, the cumulative effect of that destruction in a few years was sufficient, *prima facie*, to account for a decrease, when it was admitted that before that there was an increase — that general proposition I can make without going into details — given even at the lowest figure, if there had been an average during all those years of 15,000 and it extended over 8,9, or 10 years as to its cumulative effects, other things being equal and no other cause being apparent, we have a right to say now you are upon your proof, what other cause was there than that?

Going back one moment (I will not ask the court to turn to the book because it is very short), — but in our collated testimony on page 232, the evidence will be found with regard to the care taken on the islands.

No person is allowed to go near a rookery unless by special order of the Treasury Agent, and when driving from the hauling grounds, the natives are forbidden to smoke or make any unusual noise, or to do anything that might disturb or frighten the seals.

Of course, the prohibition against smoking and drinking whisky would

make our field of operations restricted to choosing proper Agents ; but, at all events, those are among the elements of good order introduced there, and show the extreme care taken that these animals on the breeding-rookeries shall not be disturbed.

Now, I want to read about this same question of increase, and I need not apologise for dwelling on this because the importance of it is very great, — it is first important to show the decrease, and then to show the cause ; and I have gone into the cause in general terms, and I will now pursue it by giving figures. This is from our collated testimony, page 278 ; Anton Melovedoff, whom I have quoted before.

(Q) Have you noticed any perceptible difference in the number of seals on rookeries from one year to another ? (A.) Yes.

(Q.) What changes have you noticed ? (A.) They have been getting less every year for about the last six years. (Q.) About how much less is the number of seals during the past year than they were six years ago ?

(A.) The number of seals this year are about one-fourth of what they were six years ago, and about one-half of what they were last year. (Q.) In what way do you form your above opinion as to the relative number of seals on the rookeries ? (A.) By the fact that many spaces on the rookeries which were formerly crowded are now not occupied at all.

Of course, I do not attach a great deal of importance to the proportion that a witness gives ; I mean, as to a quarter, or a third, or a half ; all we mean to show is that the decrease was perceptible and large.

Now we have the testimony of Mr Sloss who was a member and agent of the former Company, and his testimony has been taken since that Company has lost its control over the business ; therefore so far as any personal interest of a financial kind is concerned he is not chargeable with any suspicion on that ground. This is page 280 of the same book, the collated testimony :

I had no difficulty in getting the size and weight of the skins as ordered, nor had my predecessors in the office, up to and including 1884. The casks in which we packed them for shipment were made by the same man for many years and were always of uniform size. In 1885 these casks averaged about 47 1/2 skins each and in 1886 they averaged about 50 4/5 skins each, as shewn by the records in our office. After this date the number increased, and in 1888 they averaged about 55 5/7 skins per cask, and in 1889 averaged about 60 skins per cask. These latter were not such skins as we wanted, but the superintendent on the islands reported that they were the best he could get.

And in further corroboration of this we come back again to an unexceptionable witness, one upon whom both parties rely, Daniel Webster, whose testimony is on the next page 281.

In the year 1880 I thought I began to notice a falling off from the year previous of the number of seals on North East Point rookery, but this decrease was so very slight that probably it would not have been observed by one less familiar with seal life and its conditions than I ; but I could not discover or learn that it shewed itself on any of the other rookeries. In 1884 and 1885 I noticed a decrease, and it became so marked in 1886 that every one on the islands saw it. This marked decrease in 1886 shewed itself on all the rookeries on both islands. Until 1887 or 1888 however the decrease was not felt in obtaining skins at which time the standard was lowered from 6 and 7 pound skins to 5 and 4 1/2 pounds. The hauling grounds of North

East Point kept up the standard longer than the other rookeries, because as I believe the latter rookeries had felt the drain of open sea sealing during 1885 and 1886 more than North East Point, the cows from the other rookeries having gone to the southward to feed, where the majority of the sealing schooners were engaged in taking seal.

I think that the fact is sufficiently made out, then, that at or about this period a decrease was observed in the number of the seals — especially noticed in the male seals because those were the ones that most immediately concerned the lessees and their agents, and that it was a continuous decrease. I think it is well established that this was the period during which pelagic sealing got its birth or at all events culminated that from 1880 to 1887, 1888, 1889, and 1890, it kept constantly increasing, and whether that was the only source of the decrease or not.

Senator Morgan. — Mr. Coudert, have you any figures to shew what was the number of vessels that were engaged in pelagic sealing in 1891 and 1892?

Mr Coudert. — Yes; I intend to produce that, and to give the names of the vessels and the numbers, and to shew the enormous increase of this business.

Senator Morgan. — In 1891 and 1892?

Mr Coudert. — Up to 1891, and even 1892.

Mr Justice Harlan. — On page 207 of the British Commissioners Report there is a Table for 1891, and previous years, which shows that in 1891 there were 50 Canadian, and 42 American vessels, the approximate catch for this year being 68.000.

Mr Coudert. — Yes, if Mr Justice Harlan will pardon me I will come to that and give those figures with such amendments as we think we may properly introduce.

Senator Morgan. — The point I am on is whether the *modus vivendi* which has been adopted twice, had any effect to stop pelagic sealing outside the Behring sea?

Mr Coudert. — No it naturally would not.

Sir Charles Russell. — It had no operation outside there.

Senator Morgan. — For that reason?

Mr Coudert. — If it was in operation it would have that effect, and not being in operation it would not have that effect.

Senator Morgan. — I understand Mr Coudert that there has been an actual increase in the tonnage or the number of vessels engaged in pelagic sealing since the first *Modus vivendi* was adopted.

Mr Coudert. — Yes; it was a stimulation to killing seals in the North Pacific the moment they could not kill them in the Behring sea.

The President. — Have you statistics about what went on during the time the *Modus vivendi* has applied?

Mr Coudert. — We can produce them.

The President. — It will be as well that we have statistics also, if you have them, of what goes on on the islands — I do not say in point of

killing seals, but in point of observation as to the number of seals.

Mr Coudert. — Yes we will give statistics on that point. As I said before, it would be very misleading for me to go into and give an account of isolated years.

The President. — Take it in the proper time.

Mr Coudert. — Yes, we will produce what evidence there is on that subject. What I have tried to establish before the Court is this — that pelagic sealing developed with great rapidity at a certain time; that after it had reached a real and serious degree of destruction a decrease in the seals was observed; that that decrease continued in a direct ratio to the number of seals killed at sea. So far those propositions are established, I think I may say, and the burden will be on the other side to show other reasons. This killing was cumulative. It was increasing in its effect whenever they killed females as well. Take the effect of killing 5,000 bearing mothers — if you please only 5,000 — in 1880. Well, it is shown that these females will bear 12 or 13, or possibly more, offspring. Now calculating the enormous destruction, and how that would be felt after three or five years, it is enormous — it is almost incalculable; and I need not argue, if it is kept on a small scale, it is destruction, because it diminishes, as Mr Carter says, the birth rate. Nothing can be fatal to the herd that does not diminish the birth rate. Anything that affects it in the slightest degree is, by its tendency in that direction, fatal.

Senator Morgan. — Mr Coudert, will you be able to give the average value, per skin, of the fur-seals in the markets, in the years 1891 and 1892.

Mr Coudert. — I suppose we can do it — we can prepare such a statement as that. Of course, this *modus vivendi* was a very expensive expedient to the United States. Instead of killing them in the Behring Sea the other parties killed them in the North Pacific, and killed more in the North Pacific because they killed less or none in the Behring Sea. But, on the other hand, the United States had consented to tie its hands, and the loss was enormous.

The President. — My learned colleague asks whether there has been any influence from this *modus vivendi* on the prices of sealskins?

Mr Coudert. — I will see if we have statistics of the prices; I am unable to say that at the moment.

Senator Morgan. — I wanted to know how much money the pelagic sealers were making out of it, and how much money the United States were making out of it — I do not care whether it increased the prices.

Mr Coudert. — It will be easier for me to tell you how much the United States *lost* out of it, because it was a dead loss to the United States and was entirely a one-sided bargain in one sense. Temporarily it resulted in a very large loss to the United States; but as the United States are anxious to save the life of the herd, then of course it would consent to a temporary loss in order to produce a permanent benefit.

Senator Morgan. — It raised the number of seals as I understand you

that was killed by the authority of the United States above 60,000 up to 75,000.

Mr Coudert. — The *modus vivendi* did?

Senator Morgan. — Yes I do not say the *modus vivendi*, I say the practice of pelagic sealing took 68,000 seals.

Mr Coudert. — Yes, against our 7,500.

Senator Morgan. — Against 7,500?

M. Coudert. — Yes; the only difference being that at sea they did not make discrimination; ours entirely consisted of males.

Senator Morgan. — It actually resulted in a larger killing of the fur-seal than the United States had permitted on the island?

Mr Coudert. — Yes, and yet it is stated by some of the witnesses I shall shew that the number of males is enormously increased, and that they can catch them without the slightest difficulty.

The President. — Was it shown that the United States ever asked by diplomatic correspondence that pelagic sealing should be interrupted on the North West coast? Perhaps in the Senate of Washington you had some information about it?

Senator Morgan. — Not in the *modus vivendi*. I think not.

Sir Charles Russell. — Not at all. A great part of the catch after the *modus vivendi* was on the Russian and Japanese side.

General Foster. — More than on the American side?

Sir Charles Russell. — That I do not know.

General Foster. — It was much smaller.

The President. — I was struck by the fact that the American Government never interfered with the question, and never asked for the *modus vivendi* to extend to the north Pacific outside Behring Sea.

I could understand that the British Government should object to it, but I cannot understand why the American Government did not ask for it. They could have asked at that time.

Sir Charles Russell. — Their case was not based on that ground at that time. You will hear the reason why they did not suggest it.

The President. — Mr Carter discussed at some length the catches of seals which have taken place on the North West coast; so the matter is a question of interest and has a close connection with the American Case.

Mr Coudert. — In the first place let me say if you read Mr Phelps's letters you will find that he did claim...

The President. — That is what I want to know.

Mr Coudert. — You will find that he did claim that there was great destruction of the seals on the North Pacific, as well as in Behring Sea and he claimed that it should be stopped.

Senator Morgan. — That was Lord Salisbury's proposition.

Sir Charles Russell. — Yes, that they would not consent to.

General Foster. — Because Canada would not allow us to do so.

Mr Coudert. — Perhaps we were right — perhaps we were wrong.

Sir Charles Russell. — You were claiming territorial sovereignty over Behring Sea, and you said you had no authority outside.

Mr Coudert. — We were claiming territorial sovereignty, and that is what we are claiming to-day, and the record shows it.

Mr Phelps's letters shew it, and our case states the fact just as we are stating it to day, and gives references in order to show this is not a new idea; and the Treaty, (which is the law of this Tribunal) says what we claimed and what we claim to day. I also state in all frankness, that this subject was not so thoroughly understood, and the great destruction which was reaped on this flock was not so well measured a few years ago, as to day.

The question is not one of estoppel on the United States. Conceding for the sake of argument, if you please, that we did not demand enough, what do both nations want to-day? That is the question.

They want to stop the destruction of this herd, and how are you going to do it?

Senator Morgan. — It is the professed object of the Treaty.

Mr Coudert. — It is the professed object of the Treaty.

Mr Justice Harlan. — It is not so much what both nations desire, but rather what they ought to have.

Mr Coudert. — When I use the word “want”, I mean that, in the sense of properly asking — properly requiring, and I do not think it is worth while to answer — (of course, I say it with all respect to my friends on the other side) — the suggestion that we did not ask enough at the time. The question to-day upon the facts is——

Sir Charles Russell. — That was not my observation.

Mr Coudert. — The question on the facts is, what we ought to have in order to carry out the joint purpose of the two nations — That is, the preservation of an important industry; and if we did not know then.——

The President. — What I meant to say was that your conclusions now, and your demand now, — what you require now — goes much further than what you asked for, on what, at least, has been expressed in the *modus vivendi*. There is a sort of contradiction between the extension you give now to your present requirements, and what has been put into the Treaty as the *modus vivendi*. That is merely what I want to call attention to — nothing more.

Mr Coudert. — I am much obliged to the President of the Tribunal, and I can only answer it in this way ——

The President. — There is a certain difficulty which I think it is useful for you to bring to light.

Mr Coudert. — I understand we got the best we could in the *modus vivendi*.

Mr Phelps. — Yes; it was the subject of a great deal of controversy.

Mr Justice Harlan. — Perhaps I may refer to the fact that President Harrison, (on rather Mr Wharton in a letter written by direction of the

President before the *modus vivendi* was signed), recognized the fact that regulations were required for the preservation of these fur-seals in Behring Sea, and also in portions of the North Pacific.

Mr Coudert. — Yes, and that is shewn by the Treaty itself, which speaks of the seals at Pribilof Islands and resorting thereto wherever they may come from. Those that resort to the Pribilof Islands are the ones that we claim protection over, and those in the North Pacific belonging to the herd are conceded to be Pribilof Island seals, and to come there and nowhere else. Now, if we were unable to obtain by diplomatic arrangements all that we thought right, I do not think, with all respect Mr President, that ought to be imputed as a waiver or abandonment of our claim.

The President. — I do not impute it as a waiver; I merely ask the fact whether you urged upon that question diplomatically before the *modus vivendi* was signed at all. If you did not ask for it, of course, it would not be conceded. It is no reproach from me.

Senator Morgan. — I do not know why it would not be conceded, if it was the purpose of both Governments to preserve the seal herd.

The President. — That is why I enquired whether you had not urged it at the moment?

Senator Morgan. — We were not asking anything, I take it, from Great Britain.

Mr Coudert. — I think this question can be settled by the correspondence, and I am glad it has been suggested, because I can read a few lines from the correspondence, although it is getting away from my subject; but this may be important. I will read from the Appendix to the Case of the United States, volume first, page 315, a letter written by Sir Julian Pauncefote to Mr Wharton, dated Washington, June 11th 1891, which is before the signing of the agreement for a *modus vivendi* four days before. Sir Julian Pauncefote says :

Nevertheless, in view of the urgency of the case, his lord ship is disposed to authorize me to sign the agreement in the precise terms formulated in your note of June 9, provided the question of a joint Commission be not left in doubt, and that your Government will give an assurance in some form that they will concur in a reference to a joint commission to ascertain what permanent measures are necessary for the preservation of the fur-seal species in the Northern Pacific Ocean.

I have the honour, therefore, to enquire whether the President is prepared to give that assurance, and, if so, I shall, on receipt of it, lose no time in communicating it by telegraph to Lord Salisbury and in applying to his lordship for authority to sign the proposed agreement.

Here is the proposition of sir Julian Pauncefote to Mr Wharton.

Now this is the answer of the President of the United States, and the Tribunal will see that no time was lost, for it is dated on the same day.

SIR, I have the honour to acknowledge the receipt of your note of to days date, and in reply am directed by the President to say that the Government of the United States recognising the fact that full and adequate measures for the protection of seal life should embrace the whole of Behring sea and portions of the North Pacific

Ocean will have no hesitancy in agreeing, in connection with Her Majesty's Government, to the appointment of a joint commission to ascertain what permanent measures are necessary for the preservation of the seal species in the waters referred to _____

That is, the whole of Behring sea, and parts of the North Pacific Ocean _____

such an agreement to be signed simultaenously with the convention for arbitration, and to be without prejudice to the questions to be submitted to the arbitrators.

Now you take that in connection with the treaty itself which provides for the protection to be given to the seals that resort to that island. All you have to find out is what seals resort to the Pribilof Islands and those seals are entiled to permanent protection. It seems to me that there cannot be any question about that.

The President.—I think it was not quite out of our subject, Mr Coudert.

Mr Coudert. — Not out; but I think it was directly germane, and I am much obliged to the learned President for making the suggestion.

Now to return to the subject which was immediately under consideration, and as I think we all agree one of capital importance — the subject of pelagic sealing. I will read rapidly what is stated in the Case. I prefer to read it because I could not possibly state it more briefly and clearly than it is stated in the Case prepared by General Foster. I read, I will say to my friends on the other side, from the Case of the United States, page 187. It is an interesting and succint history of this so-called industry :

Open-sea sealing, the sole cause of the enormous decrease noted in the Alaskan seal herd in the last few years, and which threatens its extermination in the near future, was carried on by the Pacific coast natives in their canoes for many years previous to the introduction of sealing schooners. The catch was small, ranging from three to eight thousand annually, and there was little or no waste of life from the loss of seals killed and not secured, as will be seen when the means and manner of hunting employed by the Indians is considered.

Even after vessels were employed in the industry, which according to Mr. Morris Moss, vice-president of the Sealers' Association of Victoria, Bristish Columbia, was about the year 1872, the fleet was small, not numbering over half a dozen vessels. Indians only were employed as hunters, and the seals were killed with spears. With the introduction of schooners to carry the canoes out into the ocean, the sealing-grounds were extended from the area covered by a canoe trip of twenty miles from a given point on the coast to the waters frequented by the migrating herd from the Columbia River to Kadiak Island. In 1884 the schooner *San Diego* entered Behring Sea and returned to Victoria with upwards of two thousand skins.

This was the initial point of priatical and destructive sealing.

Sir Charles Russell. — The " *San Diego* " was an American ship, I think.

Mr Coudert. — Possibly.

General Foster. — And she was condemned by our courts.

Mr Coudert. — If they would all be American ships we would not resort to arbitration to take care of our seals. I proceed :

This gave impetus to the trade

Then it was that the Canadians came in

and new vessels embarked in the enterprise.

About 1885 a new method of hunting was introduced, which has been the great cause of making pelagic seal hunting so destructive and wasteful of life — the use of firearms. White men now became the principal hunters, and where previously the number of skilled and available sealers had necessarily been limited to a few hundred coast natives, the possibility of large rewards for their labors induced many whites to enter the service of those engaged in the business of seal destruction. From that time forward the sealing fleet rapidly increased in number, until it now threatens the total extinction of the northern fur-seal.

I would refer here at this point to the list of sailing vessels. It is opposite page 591 of Appendix No 1 of our Case, and I will ask the Court to look at it because it gives you not only the names and accurate information in detail, but if you examine it, it is a sort of chart which shows where it begins and how it extends. It is an object lesson as General Foster suggests and one of singular interest and importance. The chart is at page 591, beginning with that small beginning and extending and expanding as you see here until we have _____

Senator Morgan. Is that a list of the vessels?

Mr Coudert. Yes sir; that is a list of the vessels.

Senator Morgan. What year does the last column refer to?

Mr Coudert. — The last column refers to 1892.

Senator Morgan. — How many vessels are there?

Mr Coudert. — I have not counted them.

Sir Charles Russell. — There is a summary at the bottom of it.

Mr Coudert. — In 1892 there were 122. In 1875 there was one. And there is no reason to suppose that they will not continue increasing. On the contrary, there are reasons to believe otherwise.

Mr Justice Harlan. — Mr Coudert, the President has asked me a question which I am unable to answer. I see in 1891 there were 115 vessels. Were those vessels in the North Pacific alone or were their operations affected by the *modus vivendi*?

Mr Coudert. — They were in both, I understand, Sir, the North Pacific and Behring Sea.

Mr Justice Harlan. — How did they get into the Behring Sea after the *modus vivendi* of 1891?

Mr Blodgett. — Because they sailed after the *modus vivendi* was made and did not get notice of it. The *modus vivendi* was not signed until June 15th and most of them had sailed and were not intercepted.

The President. — There were no seizures in 1891?

Mr Justice Harlan. — Yes; I think there were some.

Mr Carter. — They were warned away.

The President. — But not seized?

Mr Carter. — Some of them.

The President. — But there is a very notable increase, you will remember, in the number of these sealing vessels during the two years of the *modus vivendi*. They were almost double.

Mr Carter. — The whole of the North Pacific was open.

The President. — I see the number is nearly double in the two last columns over the preceding ones and that is precisely the year when the *modus vivendi* was in operation.

Senator Morgan. — That is because they found the fishing on the outside twice as good as it was on the inside.

Mr Carter. — The price of skins was twice as great.

Mr Coudert. — There is also this and it is the strongest possible illustration of what the President stated a minute ago. Notwithstanding this *modus vivendi* in 1891, 28,888 seals were killed in Behring Sea. Take those figures in connection with that sort of chart that I have given you, that list which operates upon the mind's eye as a chart or object lesson and you can see what proportions this is taking. I will say in addition to that, that it is an ever increasing business. And you are asked by our friends on the other side to make provision, not only for that business as it exists to-day with its enormous fleet, but as it is likely and certain to exist in the future.

Mr Justice Harlan. — I do not gather your statement exactly.

Mr Coudert. — 28,888 are figures we have of that catch in 1891 in Behring Sea.

Mr Justice Harlan. — Notwithstanding the *modus vivendi*?

Mr Coudert. — Yes sir. That we get from our adversaries.

The President. — Perhaps Mr Blodgett will tell us whether the sealing has yet begun in this year. You say that in 1891 the sealing had begun before the notification of the *modus vivendi* could be communicated. How is it this year?

Mr Blodgett. — The notification was not made until the 15th of June. The sealing vessels left Victoria, Port Townsend and San Francisco several weeks before that and were out on the ocean. They got no notice. Some of them were met by the cruisers of the United States in the Behring Sea and warned out. Others remained there and made their seizures.

The President. — I am afraid they may go on this year, and there will be an increase.

General Foster. — I think I can make it clear, if you will allow. In addition to what has been stated in 1891, in 1892, under the *modus vivendi* the presence of vessels in Behring Sea with fishing equipment on board was a sufficient justification of her condemnation without any notice. That is the difference between the condition of things in 1891 and in 1892. Consequently only a very few vessels went into Behring Sea in 1892; because if they had gone in it did not require a notice previously, but their presence there would be the cause of their condemnation. The commander of the American fleet reports that less than 500 seals were taken in Behring Sea in 1892. That *modus vivendi* will be in operation the present year. The sealing season has not yet begun in Behring Sea. The seals have not reached there.

Sir Charles Russell. To make the matter intelligible, if I may be per-

mitted to interrupt as so many of my friends are interrupting — you will recollect, Mr President, that there is an imaginary line drawn down Behring Sea, to the east of which line is the Behring Sea claimed by the United States. The other portion of the Behring Sea to the west of that line was not at all affected by any of these arrangements embodied in the *modus vivendi* of 1891 or of 1892; and the result was as Mr Blodgett has said, some of the vessels did go to the eastern part of Behring Sea before the promulgation of the *modus vivendi*; but after that promulgation they went to the west of the line and continued fishing along the Japan and Russian coasts.

Mr Justice Harlan. — Was this 28,000 which Mr Coudert referred to the number of seals taken west or east of that line?

Sir Charles Russell. — A large part of it, or practically so of the years catch to the west and south.

Mr. Coudert. — To the west, on the Russian side.

The President. — In the free waters.

Sir Charles Russell. — I will not say all of it, because, as Mr Blodgett has properly said, some of the vessels went into the Bering Sea, as usual, before the promulgation of the *modus vivendi*; but substantially the bulk of it — the larger portion — to the west and south.

General Foster. — I am very sorry to call in question the statement, but I think the facts will show, on critical examination, that the 28,000 reported are the catch of Behring Sea proper, as we understand it, within the American territorial lines; and that is kept separated in the report from the catch on the Asiatic coast, which is in separate statistics. I think an examination will show that the 28,000 seals were taken in what are called the American portions of Behring Sea.

Mr Coudert. — We have also in connection with this a map or chart, showing the position of the sealing vessels seized or warned by the Government of the United States during the season of 1891.

Sir R. Webster. — What is the number of that chart?

Mr Coudert. — It is No. 6 in our book of maps, “ Seizures, 1891 ”, and it will show that those ships then had no scruples as to being in our waters because every one of them, as indicated on this map, are in American waters. Without dwelling upon that map, I simply call attention to it.

Sir Charles Russell. — You mean east of the line?

Mr Coudert. — Yes. We have it, then, that in 1891, notwithstanding the obstacles interposed, there were 28,888 seals killed by the pelagic sealers. We take issue with our learned friend on the other side when he assigns a Russian domicile to those seal in the main. On the contrary, we claim that they were caught, if not all, at least the greater part of them, on our side of the Behring Sea.

But I propose to go on with the question that was under discussion, and to read now more about this sealing from page 189 of our Case. That is as to the method :

The vessel commonly used in sealing is a schooner ranging from twenty to one

hundred and fifty tons burden; the average tonnage per vessel for the Victoria fleet in 1892 being 63.2 tons.

That is the average tonnage per Vessel, 63 and a fraction. I continue :

The number of hunters and canoes or boats carried by a sealer depends upon the size of the vessel, but the average number of canoes is between ten and sixteen, each manned by two Indians, and when the hunters are whites the boats generally number five or six. In some cases both Indians and whites are employed on the same vessel. The average number of men to a vessel in 1890 was twenty-two.

The Indian hunter almost invariably uses a spear, and though in the last two or three years firearms have been carried in the canoe, the principal weapon used by him is still the spear. A full description of the spear, canoe, and manner of hunting is given by Lieut. J. H. Quinnan, who accompanied some of the Indians in their canoe during a hunting excursion. The most expert spearmen are the Makah Indians of Neah Bay, Washington. The Indian, from his method of hunting loses very few seals that he strikes, securing nearly all.

The white hunter, on the contrary, loses a great many seals which he kills or wounds. Each boat contains a boat-steerer, and a boat-puller; the hunter uses a rifle, a shotgun, or both, the shotgun being loaded with buckshot. A minute description of the methods employed by both white and Indian hunters is given by Capt. C. L. Hopper, commander of the United States revenue steamer *Corwin*, who was many years in the waters of the North Pacific and Behring Sea, and makes his statements from personal observation.

I will give the Tribunal some figures. I read now from page 366 of the Case of the United States, from the reports of the Behring Sea and the report of the American Commissioners. We have the catch for all the years from 1872 to 1891, on page 366. The sources of information upon which the table is based that we submit to the Tribunal are given in the note, and they will be found to come from sources which are not open to suspicion, but if they could in any way be supposed to favour either party, it would be our friends on the other side :

The number of seal skins actually recorded as sold as a result of pelagic sealing is shown in the following table :

YEAR.	NO. OF SKINS.	YEAR.	NO. OF SKINS.
1872	1,029	1882	17,700
1873		1883	9,495
1874	4,949	1884	* 14,000
1875	1,646	1885	43,000
1876	2,042	1886	38,907
1877	5,700	1887	33,800
1878	9,593	1888	37,789
1879	12,500 +	1889	40,998
1880	13,600	1890	48,349
1881	13,541	1891	62,508
* Number estimated from value given.			

The Tribunal will observe that in 1891 the figures are given as 62500. A moment ago I gave some figures for that year of 28888, but that was

only Behring Sea we spoke of a moment ago, the total catch being 62500, leaving still open the question that sir Charles Russell suggested a moment ago, that some or many or few were taken from the Russian side.

The President. — The British table that has been mentioned, on page 207 of the British Commissioners Report, gives the total for 1891 as 68000.

Mr Coudert. — Which makes it still stronger.

The President. — Their figures are stronger than yours?

Mr Coudert. — Yes sir. We are satisfied to take either of those figures.

Sir Charles Russell. — Our partial Commissioners!

Mr Coudert. — They may make a mistake on the side of right, of course. Anybody might.

Mr Justice Harlan. — The difference, perhaps, is explained by the fact that the British table approximates the catch of both Canadian and United States vessels, whereas in your table the Canadian catch only is given, and the United States catch is not given.

Mr Coudert. — Then I take back what I said. The tribute to the British Commissioners is understated.

Sir Charles Russell. — It includes the United States catch except that portion which is sold in California.

Mr Justice Harlan. — To which table do you refer?

Sir Charles Russell. — The table on page 366, which has been referred to. The catch of American vessels sold in San Francisco is not included. That is the only thing that is excluded.

The President. — I think we can agree by this comparison that both tables have been drawn out very fairly, and with great credit to both parties.

Mr Coudert. — I hope the Tribunal, notwithstanding my desire to acquiesce, will not hold me as endorsing the opinion that the tables prepared by our friends on the other side are impartially drawn. for I do not believe they are.

The President. — We know your opinion about the British Commissioners, and perhaps we had better leave that.

Mr Coudert. — When I find fault with what the Commissioners aver, I hope I need not repeat what I have said before, that these gentlemen, of course, are incapable of making a misstatement; and when they tell us what they saw or what they did, we accept their assurance without the slightest hesitation; but I think it was one of your fellow-diplomats, Mr President, who said: "Give me a pen and figures, and I will prove what you like". That is true in diplomacy, and it is true in Commissions also.

The President. — I think, Mr Coudert, you can show that it is not necessary for you to have a pen and ink for that.

The Tribunal here adjourned until Tuesday, May 9, 1893, at 11.30 o'clock A. M.

NINETEENTH DAY. MAY 9TH, 1893

Mr Coudert. — May it please the learned President and the Arbitrators.

Before proceeding with the regular course of the argument such as I was pursuing at the hour of adjournment, I want to ask the attention of the High Court to a printed statement that has been compiled under the care of General Foster, and which may be of some use to the Court. A copy has been handed, or will be, to our friends on the other side. I use it for the sake of convenience.

The learned Arbitrators will recall that there was some discussion as to the effect of the *modus vivendi*; and it was plain the *modus vivendi* had operated entirely to the disadvantage of the United States, and that, while the United States had tied up its hands and had prevented itself from going on with its regular and legitimate business in the interests of harmony and conciliation, the work of devastation had been going on in the North Pacific, and an enormous number of seals had been slaughtered. In connection with this and to make it more definite, I will read the short statement; and every statement here is taken from the evidence in the Case.

The seals killed on the Pribilof Islands in 1890 amounted to 21,238. That is our number of seals killed. The pelagic catch, according to the British Commissioners Report, amounted to 51,655; being a total catch of 72,893.

In 1891, the year following, under the *modus vivendi* of that year, the seals killed on the Pribilof Islands amounted to 12,071. The pelagic catch gave 68,000 to those engaged in that business; making a total of 80,071.

The seals killed on the Pribilof Islands last year, that is in 1892, under the *modus vivendi* of that year, were 7,500. In the pelagic catch there were captured 73,394, being a total catch of 80,894.

Now, your Honours will see from this statement that, in 1890, 21,000 were killed; in 1891, only 12,000, and, in 1892, 7,500 on the islands; leaving an enormous margin to be filled up in some way or other to supply the wants of the world. Those wants were never completely filled, though the pelagic catch, as you will see, very largely increased during those three years. The natural result, of course, was to affect the price of the skins; and these we have given.

In 1889, before these figures that I have given in this Statement, the average price per skin was \$6,83. In 1890 it rose to \$10,70; and, in 1891, the average price per skin was \$15 less one cent.

Senator Morgan. — Was that the price in London?

Mr Condert. — No this, in the price in Victoria. That is where all these skins go. They are sold there and then send on to the dressers in London. So that you will see that the result of this was to send the price of skins up more than double. That is from \$ 6,83 to \$ 14,99. There was naturally a greater demand for slaughterers on the high sea and the wages correspondingly rose. In 1889 the price paid to hunters per skin was \$ 2 to \$ 3. In 1891, \$ 3 1/2. In 1892, \$ 4, and the business becoming thus profitable owing to the fact that competition on the part of the United States had been practically abrogated, we find the vessels engaged in sealing correspondingly increasing in number. In 1890 the number of vessels was 61. In 1891 it was 115 and in 1892, 122. What the effect of a protracted *modus vivendi* would be it requires no prophet to tell.

The following is the Table handed in :

PRIBILOF AND PELAGIC CATCHES FOR 1890, 1891, AND 1892

1890

Seals killed on Pribilof Islands	21,238
<i>(U. S. Case, vol. II, p. 112).</i>	
Pelagic Catch.	51,655
<i>(Br. Com. Report, p. 207).</i>	
Total Catch.	72,893

1891

Seals killed on Pribilof Islands.	12,071
<i>(U. S. Case, vol. I, p. 333).</i>	
Pelagic Catch.	68,000
<i>(Br. Com. Report, p. 207).</i>	
Total Catch.	80,071

1892

Seals killed on Pribilof Islands.	7,500
<i>(Modus vivendi).</i>	
Pelagic Catch.	73,394
<i>(U. S. Counter Case, p. 438).</i>	
Total Catch.	80,894

Average price of skins at Victoria

1889. Average price per skin.	\$6,83
1890. Average price per skin.	\$10,70
1891. Average price per skin.	\$14,99
<i>(U. S. Case, vol. II, p. 534).</i>	

Wages paid hunters at Victoria

1889. Price paid per skin.	\$2 to \$3
1890-91. Price paid per skin.	\$3,50
1892. Price paid per skin.	\$4,00
<i>(British Counter Case, vol. II, p. 222).</i>	

Vessels engaged in sealing

1890. Number of vessels	61
1891. Number of vessels	115
1892. Number of vessels	122
<i>(U. S. Case, vol. I, p. 590).</i>	

Now I want to supplement this by a paper which is not printed but which I will hand to my learned friends on the other side, so that they may comment upon it or criticize it as they please. It is the pelagic catch of the Victoria fleet in 1891. This is a matter of computation, and I shall not dwell upon it; if my learned friends find it incorrect they can state their corrections. Table A of the British Commissioners' Report, page 205, contains a list of Canadian sealing vessels, with the date of their warning in Behring Sea, and of their return arrival at Victoria. Of these vessels, 44 are shown to have taken seals in Behring Sea, and of the latter, 29 were found and warned on the American side of the sea, and 3 others not warned are shown by testimony to have entered that side, establishing the fact that at least 31 out of 44 British vessels did take seals on the American side in 1891, in spite of the *modus*. A careful examination of the table and of the data in evidence has been made, with the following approximate result. Catch in American waters of Behring Sea 23,041 on the Asiatic side 5,847, being a total for the Behring Sea catch of 1891 of, 28,888. I repeat, we will hand a copy of this to our learned friends on the other side.

I will now come back to the question I was discussing, namely, the nature, character, and effect, the fatally destructive effect of pelagic sealing; and it is hardly necessary to argue, but I shall to some brief extent endeavour to prove that if I have shown enormous slaughter on the sea and that of the most cruel, and mischievous and destructive kind, it is unnecessary to produce much proof to account for the loss on the islands. As it is in proof, and as it is uncontradicted that all the mothers go to the islands, that, all the young are born there, it is manifest and requires no proof to show that if I have proved a large number of mothers to have been killed during a long consecutive number of years, the result is inevitable, and the birth-rate must have been most seriously diminished on the land. The catches from 1871 to 1882 average over 13,000 for Canadian vessels alone, and this, of itself, without further explanation or comment, is sufficient to account for the decrease which was noticed on the Pribilof Islands in 1884 and 1885. Of course, there was a decrease but it was not noticed until then. Naturally they would only notice it when they came to picking out the young males and then the supply, or, as it is called, some times, the crop, of three or four years before not coming up to the usual level, it was observed that the supply was deficient.

It is probable that American vessels took as many seals during those years as did Canadian vessels. The figure of 13,000 takes no account of the fact that a large number must have been — that a large number were and are proved to have been gravid females, and that a certain number in addition were lost. How large the number of those lost by what we have called waste and being wounded and killed and going down to the bottom of the sea because of the specific gravity being so much greater than water, of course is a matter of conjecture. Our proofs estimated this very high, as high as 50 or 60 per cent. The proofs on the other

side 5, 6, 7 and 8, and even as high, I believe, as 10, though it is in proof from their own witnesses, that what is called the green hunter — and the green is a chronic appurtenance to sealing on the sea, as I have shown, misses 25, at least of those that he shoots or shoots at.

Now with regard to the character of pelagic sealing, there is one element about it — and we all agree about that — that ought to be fatal to its existence, if it is intelligently considered and properly restricted and that is that you cannot, by the very nature of things, discriminate. A man who would go into his cattle yard, killing right and left males and females, the bulls and the cows, would probably have a committee appointed for him to take charge of his estate, because he was unfit to manage it himself. This is precisely the same, except that it is almost as bad as though this cattle owner or farmer were to put all his gravid females in one barn yard, and go and slaughter them in preference to all the rest — that is the only difference that I can see. It is indiscriminate, I say, and that requires no argument : it is admitted.

Here is the practical, realistic way in which our friends, the British Commissioners, state it. There is no idealism about it. Section 633.

By the pelagic sealers and by the Indian hunters along the coast, fur-seals of both sexes are killed, and, indeed, it would be unreasonable, under the circumstances, to expect that a distinction should be made in this respect, any more than that the angler should discriminate between the sexes of the fish he may hook.

It is absolutely true. If you permit pelagic sealing, do not ask the impossible of them. Tell them, « Go on, call it fishing ; treat it as fishing, and have no more sentiment or regard upon the subject than when you drop your baited hook into the depths of the Ocean and pull up a fish. » The effect of this, fortunately or unfortunately, we know something about. Climate does not regulate this, but the laws of nature ; and nature itself has indicated, under penalty of extinction of the thing itself, the killing of females. Here is what is the experience of the world has taught in the Southern Seas. That map is an object-lesson, to which I will call the attention of the Court in one moment ; but first, let me read what the British Commissioners, at section 860, say upon the subject :

It is a matter of some difficulty to estimate the total number of seals taken in the South Seas during the period of the excessive energy of the great sealing industry. But there are actual records which, added together, bring the acknowledged total to more than 16,000,000.

These seals were taken from about thirty different island groups or coast districts on the mainland, and they were all taken by the one method of indiscriminate slaughter on shore.

It is probable that this wholesale slaughter did not extend over more than seventy years, but it is certain that at the end of the period the fur seals were so terribly reduced in numbers that even the sixty years of subsequent rest and total cessation of killing have not sufficed to bring about any effectual restoration of the numbers of years gone by.

While this condemnation of these British Commissioners attaches to this kind of killing, why should it not attach equally to indiscriminate

slaughter on the high seas? What is the difference? It is more convenient; and that explains the raiding upon our Islands. It is less dangerous, because the tempests do not touch and possibly imperil their lives. But what is the difference between killing them on the high sea indiscriminately and killing them upon the land indiscriminately? The havoc that operated upon the Southern Seas in a few years made a wreck of this business; shall it not make a wreck in the future, as I have already shown?

Now, I want to read briefly from the Case of the United States, page 218.

The indiscriminate slaughter of seals in the waters of the Pacific Ocean and Behring Sea can not fail to produce a result similar to that observed in the southern hemisphere, where the fur-seals have, except at a few localities, become from a commercial point of view, practically extinct. A full account of the distribution and the destruction of the antarctic seal herds is given by Dr. Allen in his article found in the Appendix?

Now, the most important of the localities are shewn on this map; and my friend, Mr Lansing, will be good enough to point them out. The most important of them are as follows. One is Masafuero, Juan Fernandez, the coast of Chile, Cape Horn, the Falkland Islands; — those were once the homes of the seals where they congregated in large numbers. — the South Georgia Islands, Sandwich Land, South Shetland Islands, Tristan d'Acunha, and Georgia Island. Then the West Coast of Africa, the Island of Prince Island, Crozet Island, Saint Paul and Amsterdam Islands, Kerguelen Island, the South Coast of Australia, Tasmania, and the Islands, south of New Zealand.

The seals in all those localities, says our case, have been destroyed by the indiscriminate killing of old and young males and females. If the seals in these regions had been protected and only a certain number of young males allowed to be killed, these lands and coast would be again populous with seal life, and that may be a subject for the consideration of this high Tribunal, whether the decision you will give in this case will not extend much further to the protection of the seals in the North Pacific and the Behring Sea, but whether it will not extend so far as that the rights of the property owners or of the owners of the industry being conceded and the value of the industry to the whole world being ascertained and stated, whether your protection would not extend over that large part of the world and whether there would not be a restoration in time of these valuable herds of animals and the rights of those who have rights there, be, efficiently though indirectly, protected.

With regard now to the results, and to show how injurious and destructive they are. I read these statements in our case from page 216:

The injurious and destructive effects of open sea sealing, as demonstrated above, can be summed up as follows: Between eighty and ninety per cent of the seals taken are females; of these at least seventy five per cent are either pregnant or nursing; that the destruction of these females causes the death of the unborn pup seals

or those on the rookeries dependent on their mothers for nourishment; and, finally that at least sixty six per cent, of the seals killed by white hunters are never secured.

As to this last figure, it is fair to say there is a considerable divergence of opinion among the witnesses.

Besides this the females taken in Behring Sea have certainly in the majority of cases been impregnated and their death means not only the destruction of the pups on the island but also of the foetus.

Hence, if 10,000 females are killed in one season, this fact means not only the depletion of the herd by at least 17,500 that year but also the reduction of the annual birth-rate by 7,500 each following year for probably fifteen years —

it seems to be almost incalculable. —

besides the added loss of the young born to the female portion of the pups destroyed which would be an ever increasing quantity.

Now what do our friends on the other side say with regard to that?

Do they say that females are not taken? Not at all. Do they deny that a large proportion of the seals taken are females? Not at all. Do they deny that a large proportion of the seals taken are females? Not at all. Do they deny that a large proportion are gravid? Not at all. All that they concede. They do not agree that our numbers are correctly stated, there may be a difference — and when we say that as many as 96 per cent, are females, and gravid females, they differ from us and say that our statements are exaggerated. Practically I think that makes no difference provided the proportion is large.

But how many females do they say are actually taken?

That is a question which will probably trouble the Court.

Now much testimony is collated in the British Counter Case, pages 202 to 207. We summarize the testimony upon that point to which I have called attention in this way: that of the witnesses (136, I think they number in all) — 54 said that they took an equal number of males and females; 45 took a greater number of females than males; and 37 99 of them out of this total number, took 50 per cent of females, or over. In making these calculations it has been assumed that those who state that they took more males than females from the Pacific, and more females than males in the Behring Sea, without giving us any figures, took an average or equal number of males and females.

Now I shall not read this testimony, but the High Court will find it, I think, as we have found it, inextricably confused and misleading. It would seem that the parties had either had most various and singularly varied experience, or that some of them, at least, were unscrupulous and simply testifying according to the exigencies of what they supposed to be their case. It is fair to the British Commissioners themselves to say that they gave very little credit to them, and said that even allowing for diversity of interest in this matter, it is impossible to reconcile the testimony of

these parties. The High Tribunal will observe that these men, assuming that they were testifying — (I am speaking of the sealers) — according to the interests of the case were in a most embarrassing position. They were likely to be impaled on either horn of the dilemma, whether more females or more males; because, if they say there is an enormous number of males, on the high seas, it being proved that all these males were born upon our shore and allowed to leave without being put to death, why what becomes of the reproach that we were killing an excessive number of males? If, on the other hand, there is an excessive number of females being killed, then the point that we make, that it is a brutal, cruel, and barbarous business, is made out. I sympathize with these men. There was only one way of extrication, which was to tell the truth; and let us assume that many of them tried, but failed.

Now the embarrassment was not only confined to the witnesses. The embarrassment was the embarrassment of Counsel themselves, because Counsel would not try to mislead the Court. Counsel would not, even for the purpose of winning their case, lead the Court one single step astray, and ask the Court to believe what evidently, manifestly, and palpably was untrue. So that when our friends on the other side come to comment on the testimony, (much of which shows that the number of males killed is enormous — some say they killed ten males to one female), they dismiss it in silent contempt, and here is what they say.

I will read from the British Counter Case, page 258.

From the outlines above given relating to the persistent killing of males upon the breeding islands, it is likewise easy to understand that the allegations respecting the large proportion of female seals included in late years in the pelagic catch may, to some extent at least be founded on fact; the actual ratio thus brought about as between the sexes rendering it certain that in sea sealing a much larger number of females than of males must be met with.

Now I might, perhaps (and I think if this were an ordinary case tried before a Judge and a Jury I should), stop here and say: Here is an admission that more than half the seals killed are females; and what difference does it make really to this Tribunal? What difference does it make to this cause or to the Counsel, if instead of 96, it is 56? The evil is not quite so great for to-day, but the destruction is just as certain for the future; and we are trying to provide for the future. And when our friends on the other side say there are more females because you killed the males, the fact, nevertheless, remains that, whatever may be the case, you are going to the fountain of life and extinguishing the possibilities of the future.

Now I am going to ask the learned Tribunal to permit me to hand up a collation of the testimony that I shall read from. It has been printed for the use of the Court, and it will save frequent references. I will hand a copy of it to my friends on the other side.

Sir Charles Russell. — I think it ought to have been handed to us before now.

Mr Coudert. — I will read from the evidence if you prefer it.

Sir Charles Russell. — No.

Mr Coudert. — It is simply taken from the book. The reason is this, that as many witnesses are referred to, it would occupy the time of the Tribunal to turn over the various pages. It is merely for convenience; it does not change the situation of the case at all.

Now we will begin by producing what may perhaps be the most satisfactory evidence, starting, of course, with this idea — that it is a fact in the case that more than half these animals are females; but I ought to preface my reading with this remark, that we took the testimony of a large number of British subjects, men who, certainly as far as nationality is concerned, would not be prejudiced in our favor. We went to the most respectable sources in England and in France; we found the very best men — the best because they knew the most, and stood the highest in their business; and our friends on the other side had the opportunity to cross-examine them. Now in some cases they did cross-examine — perhaps in all cases — but they have given us, in a few cases, the result of that cross-examination; and wherever they have done it we have stated it in these printed extracts.

Sir Charles Russell. — Yes, but not giving it in full in any of them.

Mr Coudert. — That may be. You can use this for what it is worth. There is no misleading; because when we say that cross-examination appears in the British Counter Case at a certain page, it is manifest that we do not pretend to give what is there — we refer you to it.

Now the first witness called is.

H. S. Bevington. — Head of the firm of Bevington and Morris, Furriers, London.

(*Case of the U. S., Appendix*, vol. II, p. 551).

It appears that the above firm was founded in the year 1726 and that deponent has been in the business ever since 1873. He says :

That the Copper and Alaska skins are almost exclusively the skins of the male animal, and the skins of the Northwest catch are at least 80 per cent of the skins of the female animal. That prior to and in preparation for making this deposition deponent says he carefully looked through two large lots of skins now in his warehouse for the especial purpose of estimating the percentage of female skins found among the Northwest catch, and he believes the above estimate to be accurate.

Mr. Bevington's cross-examination appears in the British Counter Case, Appendix, vol. II, page 249; he has nothing to say upon the above subject.

Now whether we state this correctly, or not, we certainly facilitate the investigations of the Court, and our friends on the other side, by giving them the references.

Now the next is :

Alfred Fraser, member of the firm of C. M. Lampson and Co., of London.

(*Case of the U. S., Appendix*, vol. II, p. 554.)

Mr Fraser is 52 years of age, and a British subject, residing in the United States.

The great majority of the skins sold from the Northwest catch are the skins of female seals. Deponent is not able to state exactly what proportion of skins are the skins of females, but estimates it to be at least 85 per cent.

The next is

Walter E. Martin, Head of the firm of C. W. Martin and Sons, Furriers, London.

(*Case of the U. S., Appendix*, vol. II, p. 569.)

The above firm have for many years dressed and dyed over 110,000 skins per annum.

Deponent has made no computation or examination which would enable him to say specifically what proportion of the Northwest catch are the skins of the female seal, but it is the fact that the great majority, deponent would say 75 to 80 per cent, of the skins of this catch are the skins of the female animal.

Now, Mr. Henry Moxon, furrier of London was then examined. This very witness has a direct examination by the British Government; and it is evident, from the language he uses, and by his phraseology, that he wants to minimise as much as his conscience will permit. He was asked:

What are the names of the brokers to whom they (the sealers) chiefly consign? — A. My firm have had the bulk of the consignments. Q. Have you ever had to consider the proportion of females in the north-west catch? — A. Not until this question arose, because prior to that no distinction was ever made either in buying skins or in selling them. They are simply sorted in quality and size, and not for the question of sex. Q. Have you, with the view of informing yourself, on the question, lately examined any consignments of north-west sealskins? — A. Yes, last week; I went carefully through a parcel of 2,000, and came to the conclusion that the percentage of females did not exceed 75 per cent, at the most.

Now here is a man who selects his own packet, who is a witness for the other side, who evidently does not mean to increase it or enlarge it; and he fixes it at 75 per cent.

The next is

Henry Poland, Head of the firm of P. R. Poland and Son, Furriers, London, established in 1785.

(*Case of the U. S., Appendix*, vol. II, page 571).

This firm prepared the tables of weights contained in vol. II of the Appendix to the British Counter Case.

That the Northwest skins are in turn distinguishable from the Copper Island and Alaska skins, first by reason of the fact that a very large proportion of the adult skins are *obviously* the skins of females animals; second, because they are all pierced with the spear or harpoon or shot in consequence of being killed in open sea.

(*Cross-examination by the British Government See British Counter Case, Appendix*, vol. II, page 250.)

As regards what is generally known as the Northwest catch I consider that on the whole the proportion of females to males taken is from 75 to 80 per cent; in grey pups and extra small pups the proportion would be 50 per cent. In the large sizes the proportion, on the other hand, would exceed 80 per cent.

The next is

William C. B. Stamp, Furrier, London.

(*Case of the U. S., Appendix*, vol. II, 574.)

He has been in business 30 years. He says:

I should estimate the proportion of female skins included within the Northwest catch

at at least 75 per cent and I should not be surprised nor feel inclined to contradict an estimate of upwards of 90 per cent. My sorter who actually handles the skins estimates the number of female skins in the Northwest catch at 90 per cent.

Probably no man in the establishment could do it better than a sorter.

(Cross-examination by British Government See British Counter Case, Appendix, vol. II, page 572).

Referring to the statement made in my said former declaration (namely that contained in volume II, App. to U. S. Case) that I should not be surprised nor feel inclined to contradict an estimate of upwards of 90 per cent of female skins in the Northwest catch, I say that whilst it is possible with tolerable accuracy to separate female from male skins in the larger sizes, as regards the smaller sizes of seals under the age of two years it is a matter of great difficulty, and often impossibility to determine the sex.

I do not understand, however, that this gentleman means to say that his statement was not correct in every respect when he made an estimate of 80 per cent. Of course they are very few, or small.

The next is

George Rice, Furrier, London.

(Case of the U. S., Appendix, vol. II, page 572).

Mr. Rice has had 27 years experience. He says :

In the Northwest catch from 85 to 90 per cent of the skins are of the female animals.

Mr. Rice's cross-examination appears in the British Counter Case, Appendix, volume II, page 246. He neither retracts nor modifies anything contained in the above quotation.

The next is

Emil Teichman, of the firm of C. M. Lampson and Co., Fur Dealers, London, formed 60 years ago. Probably this firm has more experience than any other firm in the world. His firm have had consignment of 4/5ths of all the seal skins sold since 1870. They sell Alaska, Coppers and Northwest Coast skins.

(Case of the U. S., Appendix, vol. II, page 581.)

The most essential difference between the Northwest skins and the Alaska and Copper catches is that the Northwest skins, so far as they are skins of adult seals, are almost exclusively the skins of female seals, and are nearly always pierced with shot, bullet or spear holes.

The next is

Emil Hertz, of the firm of Emin Hertz and Co., Furriers, Paris.

(Case of the U. S., Appendix, vol. II, page 587.)

The firm buys sealskins at London auctions in the undressed state and has them dressed in London, and dyed partly in London and partly in Paris.

That the said firm can distinguish very readily the source of production of the skins when the latter are in their undressed state ; that for several years besides the skins of the regular companies.... the said firm has bought quantities of skins called Northwest coast, Victoria, etc. That these skins are those of animals caught in the open sea by persons who apparently derive therefrom large profits, and nearly three-quarters of them are those of females and pups, these probably being less difficult to take than the males ; that these animals are taken by being shot.

Then we have the evidence of Mr Révillon, which I alluded to and partly read the other day, and I will read that :

Léon Révillon, of the firm of Révillon Frères, Furriers, Paris.

(Case of the U. S. Appendix, vol. II, p. 589.)

That the said firm of Révillon Frères have bought during the last twenty years upwards of 400,000 seal-skins.

That deponent believes that the firm of Révillon Frères is by far the largest firm of furriers and fur-dealers in France.

That we have often heard, and from different sources, that these last-named (North-west coast) skins are in the majority the skins of the female seal. The thinness of the hair upon the flanks.

I want to call attention to this because I will refer hereafter to this evidence :

The thinness of the hair upon the flanks seems to confirm this assertion, although it is impossible for us to test the absolute truth of this statement for ourselves, for when the seals have been dressed the signs of the mammae disappear. At any rate the employment of these skins is much less advantageous to our business because there is a great predominance of small skins, which are evidently those of young seals which are not killed by the companies which have the concessions for the Alaska and Copper sealskins. Moreover these Victoria or Northwest coast sealskins are riddled with shot, which very materially depreciate their value, while the seals of both the Alaska and Copper companies are killed by a blow of a club upon the head, which does not at all impair the quality of the skin as regards its ultimate uses.

Cross-examination by British Government. (See British Counter Case, Appendix, vol. II, p. 230.)

Q. The first point on which I desire an explanation is as to the statement in your deposition that you have often heard, and from different sources, that the majority of the North-west skins are the skins of the female seal. As a matter of fact, Mr. Révillon, have you, in the course of your business, to consider the question of sex at all? — A. No; we never buy or sell by sex. It is never mentioned in any sale catalogue. We buy in lots, which are made up according to sizes, such as middlings and smalls, large pups, small pups, etc.

Q. Any of these lots then may contain both male and female skins? — A. Yes.

Q. The question of sex, therefore, is not an element which you consider in the price, and is one which you never have to consider? — A. That is so.

Now the explanation of this is that it seems to be more (as far as any difference between Counsel on the other side and ourselves are concerned), a play upon the words. They do not consider the question of sex *per se* — the question is as to the quality of the skins — and there the question of sex with other items comes in and Mr. Révillon states this — that the thickness of the hair upon the flanks and the distension of the skin affects the thickness of the hair, and upon the thickness of the fur, to a great extent, depends the value of the skin; though when you look to the witnesses — whether they are sorters or otherwise it does not appear — it is not likely Mr. Révillon ever troubled himself to examine the skins, — they come in two, three, five and ten thousands and he being the head of the firm never examined a lot in his life.

I do not know whether he did or did not—but he knew what the common report was, and he tells us has he heard, and often heard, and from different sources that the majority of these skins were females; and then he goes on and tell you why that is important—because by reason of the distension of this animal in its condition as a mother, or about to become a mother, it affects the value of the fur.

We now have the evidence of.

George Bantle, of San Francisco, packer and sorter of raw skins.

(Case of the U. S., Appendix, vol. II, p. 508.)

Mr Bantle is 53 years old and has been acting as packer and sorter of raw skins for the last twenty years. In the last ten or twelve years he has handled annually from 10,000 to 15,000 raw seal-skins.

I have examined and sorted a great many thousand seal skins from sealing schooners, and have observed that they are nearly all females, a few being old bulls and yearlings.

Then the next is.

John N. Lofstad, of San Francisco, Furrier, of 28 years experience.

(Case of the U. S. Appendix, vol. II, p. 516.)

I have bought and examined the catch of a great many sealing schooners during the last ten years, and have observed that 85 to 90 per cent of the skins taken were from female seals.

The next is.

B. H. Steenfels, of San Francisco, Furrier.

(Case of the U. S. Appendix, vol. II, p. 522.)

He has been engaged in handling and purchasing furs for 26 years and is thoroughly familiar with the fur-seal skins in their raw and dressed condition.

In buying the catch of schooners engaged in the sealing business, I have observed that fully 75 per cent of them were females and had either given birth to their young or were heavy in pup when killed, which was easily observed by the width of the skin of the belly and the small head and development of the teat.

Of course, any skilful man must observe these things as he examines a skin, especially when he finds skins that are so riddled with bullets.

Now the next is :

Samuel Ullman of New York, member of the firm of Joseph Ullman, Furriers, one of the great, fur houses of the world.

(Case of the U. S. Appendix, vol. II, p. 527.)

The house of Joseph Ullman began its fur business in 1854, and has dealt in fur-seal skins ever since they became an important article of commerce. The house now does business at St. Paul, Leipsic, London and New-York. - Samuel Ullman has personally handled sealskins for the last twelve or thirteen years. Since the year 1887 he has purchased at Victoria 37,000 Northwest Coast skins.

Then he gives his opinion. It may go for what it is worth; it is not for that that I read his. He says :

I am of opinion that the nations interested should arrive at some agreement by which the killing of seals in the water will be stopped. It is true that the Northwest Coast catches have of late years placed upon the market a certain number of good skins which could be purchased at prices far below those for which skins of the Alaska catch were sold.

But I realize that this cannot continue to be the case, for *it is a matter of common*

knowledge amongst furriers that these Northwest Coast catches are composed mainly of the skins of female animals, and I understand that the killing of female seals is rapidly impairing the value of the herd.

This is valuable as showing what is a matter of common knowledge among furriers, and this is agreed to by the six leading furriers of New York City. I do not read this, but it may be found in the Case of the United States, Appendix, vol. II, pp. 528-532.

At page 533 Mr Ullman further states :

I have had such experience in handling fur-seal skins as enables me, readily in most cases, but always upon careful examination to distinguish a female skin from a male skin, and I know it to be a fact that a very large proportion of the skins in such shipments are those taken from female animals.

We now have :

George H. Treadwell, of Albany, New York, Furrier.

(Case of the U. S., Appendix, vol. II, p. 523.)

He is as the head of a house which was established in 1832, and he has been personally interested in the fur business since 1858. Since 1870 he has annually bought from 3,000 to 6,000 salted fur seal skins in London, all of which have been dressed and dyed in Albany.

In addition to dressing and dyeing, our house annually manufactures a large number of fur-seal-skin articles. I am deeply interested in the protection of the fur-seals. While the Northwest Coast catches have of late years placed upon the market comparatively cheap skins, and in that way perhaps benefited my particular business, yet I recognize the fact that such benefit can only be of temporary duration, for I have always noticed that these catches are largely composed of female skins, and I know that to kill female animals seriously impairs the herd. Besides, skins are being now put on the market at such irregular times and in such uneven quantities that buying them has become a speculative business.

I believe that the whole trouble has been brought about by the Victoria and other pelagic sealers, who furnish the present cheap skins. Both in order to maintain the herd, and to restore the seal-skin industry to a sure footing, I should like to see all taking of seals in the water prohibited.

In March of this year, I made a contract with parties on the Pacific coast for their supply of northwest coast skins (*i. e.* skins taken in the Pacific Ocean) caught during the present year, and about a month ago I received the first consignment under this contract. It was composed of the skins of the spring catch. Later on I expect to receive two further shipments.

The first consignment was placed in cold storage at the Central Stores in New York City.

A short time since I consented, at the request of the United States Government that this consignment be examined, in order to determine how many female skins it contained. To perform the examination I detailed John J. Phelan. This man has been in the employ of my father or of myself since the year 1868. I regard him as one of the most competent and trustworthy men in our service. I have read an affidavit verified by him on the 18th of June. I agree entirely with what he says concerning his experience in the handling and dressing of skins, and from what I know of his character and ability I believe that everything stated by him in this affidavit is correct.

I am 35 years of age, a citizen of the United States.

Then we supplement this affidavit by that of Mr Phelan.

(Case of the U. S., Appendix, vol. II, p. 518.)

He says :

As a result of the work I have performed for so many years I am able to distinguish, without difficulty, the skin of a female seal from that of a male seal. There are generally

several ways in which I can tell them apart. One of the surest ways consists in seeing whether any teats can be found. On a female skin above the age of 2 years teats can practically always be discovered; when the animal is over 3 years old, even a person who is not an expert at handling skins can discover two prominent ones on each side of almost every skin. This is because after the age of 3, and often even after 2, almost all females have been in pup...

I have been able to test all my observations as to the teats on salted fur-seal skins by following these skins through the various processes which I have described. During these processes the skins become thinner and thinner, and the teats more and more noticeable, and at an early stage in the dressing they must be wholly removed. There are other ways of distinguishing the skins of the two sexes...

I was sent to New York from Albany a few days ago by Mr George H. Treadwell, with instructions to go through a certain lot of seal skins, which I understand he had recently bought in Victoria, and to find out how many of these skins were taken from female animals. I have spent four days in doing this, working about seven hours a day.

There were several men who unpacked the skins and laid them before me, so that all of my time was spent in examining the individual skins. The lot contained 3,550 skins. I found that, with the possible exception of two dried ones, they were taken from animals this year; they were a part of what is known as the spring catch. I know this to be the case by the fresh appearance of the blubber and of the skin as a whole. This affords a sure way of telling whether the skin has lain in salt all winter or whether it has been recently salted. I personally inspected each one of these skins by itself and kept an accurate record of the result. I divided the skins according to the three following classes: Males, females, and pups. In the class of pups I placed only the skins of animals less than two years of age, but without reference to sex.

I found in the lot 395 males, 2,167 females, and 988 pups. Leaving out of account the pups, the percentage of females was therefore about 82.

The great majority of what I classed as male skins were taken from animals less than 3 years of age. There was not a single wig in the lot. On the other hand, nearly all of the female skins were those of full-grown animals. On every skin which I classed among the females I found teats, with bare spots about them on the fur side. Such bare spots make it absolutely certain that these teats were those of female skins.

With regard to the pup skins, I will say that I did not undertake to determine whether they were males or females, because they had a thick coat of blubber, which, in the case of an animal less than 2 years old, makes it very hard to tell the sex.

All of the skins that I examined were either shot or speared. I did not keep a close count, but I am of the opinion that about 75 per cent of them were shot.

The result of the examination is about what I had expected it would be. The figures only confirm what I have always noticed in a general way, that nearly nine-tenths of the skins in any shipment of Northwest coast skins are those of female animals.

This examination, in connection with one of the same kind, is, I think, of very great importance. There is nothing loose — there is no estimate about it. It is mathematics, and all this testimony embraces all the men that can be referred to, practically — that is all those who deal with this Northwest catch, and it is of great importance. Here is a man who bought this lot without any special object except for the purposes of his business; and when the United States discovered that they asked him to count these. He takes them one by one, and takes four hours to seven hours a day, and he gives them this estimate which agrees with the estimates we have already given. He makes the percentage about 82. Mr Grebnitzky goes as high as 92 per cent. The fact is they are almost all females — that would be the popular and true way of expressing it — practically they are all females.

The next is

William Wiefert, sorter of skins.

(*Case of the U. S. Appendix*, vol. II, p. 535.)

He is 47 years old; became foreman of Asch and Jaeckel (one of the leading

fur houses of New-York in 1886, and since that time has been superintendent of the manufacturing department of that house.

I have handled, assorted and closely inspected at least 100,000 dressed and dyed fur-seal skins.

During the past two years I have handled large numbers of North west Coast skins (*i. e.* skins of animals taken in the Pacific Ocean or in Behring Sea). I have assorted all of them, and in doing so have specially noticed the fact that a very large proportion were skins of female animals. To determine this fact in the case of dressed skins I see whether there are any teat holes. I never call a skin a female skin unless I can find two such holes on either side. These holes can generally be distinguished from bullet or buckshot holes, of which there are generally a great number in Northwest Coast skins. In the Case of a shot hole it is always evident that the surrounding fur has been abruptly cut off, while around the edge of a teat hole the fur gradually shortens as it reaches the edge, and naturally ceases to grow at the edge.

I have just looked over an original case of ninety dressed and dyed Northwest Coast fur-seal skins, which have been lately received from London, and were still under seals placed on them in London. I found that of these ninety skins only nine were those of male animals.

This mode of telling dressed skins is in accord with what the British Commissioners say, sec. 653 of their Report :

It is also easy, especially after the skins are prepared, to recognize the four teats of the female. But, more especially in the smaller skins, the marks of sex are extremely difficult to trace. For instance, in one parcel examined in London which was marked " faulty ", all the skins, with the exception of three, were female, and most of them badly shot-marked. But the great majority were young females, giving but little or no evidence of having suckled any young.

For further evidence by furriers upon this point, see Appendix to Argument of the U. S. pp. 410-419.

We ask no better corroboration than this given by the British Commissioners. So that, after all the only difference is that the furriers cross-examined by the British Counsel — the furriers whose cross-examination is deemed of sufficient value, as minimising the value of our evidence, to find a place in the British Counter Case — these gentlemen do not place the percentage of females at less than 75 per cent; so that after all; upon the water prob-

In March of th? that you thus far have, you must find that the percentage supply of northwest c? between 75 and 96 per cent. As I said before, that is a present year, and about all consequence. It was composed of the sk? shipments.

I read something from Mr Grebnitzky's testimony. I am The first consignment wa? order of evidence — the examination of the catches of A short time since I consel? is of course, is evidence of the highest value. There perform the examination I detai? nity to deceive, if so inclined, unless it should be my father or of myself since the y? of the United States have made misstatements. trustworthy men in our service. I June. I agree entirely with what you know whether Mr Grebnitzky was author- dressing of skins, and from what I k. ment to be a witness? thing stated by him in this affidavit is

I am 35 years of age, a citizen of th? Foster says that he was.

Then we supplement this affi? ition may be considered official in a certain

(*Case of the U. S.*, All find he is a gentleman of such a char-

He says : er side speak of him as a reliable witness.

As a result of the work I have performe? d by my associates that it should not be without difficulty, the skin of a female seal fr? although the Court may have thought

I have gone on the very verge being tedious in reading so much — it is only a part of the testimony of the furriers; and if any doubt whatever remains after this reading, the Arbitrators can satisfy themselves because we have given them references to the Appendix to the Argument of the United States, which contain all the testimony upon the point.

Mr Phelps. — The same as to the evidence you are now about to read, in respect to the searches of the vessels — a good deal more there is set out.

Mr Coudert. — Yes. Upon this point there are only extracts from the evidence of some of the witnesses. It would be taxing the patience of the Court too heavily to read it all. There is an enormous mass of it; we have taken some of it and the Court can judge from this what the nature of the evidence is and what its real meaning may be.

I am now going to read from the examination of witnesses as to the catches of the sea ling vessels. In the Counter-Case of the United States, will be found the testimony of Mr Grebnitzky. He makes the following sworn statement :

This year I have counted over 3 500 skins seized on poaching vessels and have found 96 per cent to be skins of females. These were skins taken from the Commander Island seals. As to skins taken near Pribilof Islands I counted the skins seized in the *Rosa Olsen* and found two-thirds of them were skins of females. These were taken as the log book of the *Rosa Olsen* shows over 88 miles from shore.

Now I would like to read—I will not ask the Court to turn to it — from the argument of the British Counsel, a short paragraph in connection with Mr Grebnitzky's testimony.

Mr Justice Harlan. — What year does this witness refer to?

Mr Coudert. — Mr Grebnitzky, 1892.

The President. — That was the year when poaching went on the other side of the line ?

Mr Coudert. — Yes. Of course making it difficult to poach on our side would have the effect of increasing poaching on the other side. It increased what the commissioners call, “the energy of the business”.

I believe scientifically no man has described what force or energy meant, but we can explain what they mean here.

In the British Argument, at page 109 (I say this for my learned friends on the other side, so that they may follow me) is this paragraph, — this is the language of the British Counsel commenting on this statement which I have just read; and I deflect from the course of my reading because it is appropriate here to show how they explain, or what comments they make on, this testimony :

Mr Grebnitzky is next quoted as affirming that 96 per cent of the seals taken at sea are females !

And that is followed by a note of exclamation.

This gentleman has had long experience as Superintendent of the Commander Islands, and any statement made by him must be received with respect; but we

may be pardoned for doubting such a statement as that here attributed to him, particularly as it is unsupported by any details of fact and is entirely in opposition to other evidence.

Perhaps I ought to comment upon the words that have slipped from the pen of Counsel when he spoke of this statement being here attributed to Mr Grebnitsky; and when the United States produces an affidavit, a paper sworn to with his signature, either they have committed the enormous crime of falsifying and forgery, or the expression ought not to have been used. But it was a slip of the pen perhaps in copying.

Sir Charles Russell. — Is it an affidavit? I do not understand it to be an affidavit.

Mr Coudert. — I do; and we state here that “ he made the following sworn statement to the United States Government. ”

Sir Charles Russell. — If you look at your own page 362, I do not think you will find that that it is so.

Mr Coudert. — When Counsel says “ it is unsupported by any details of fact, ” I do not precisely know what it means.

Sir Charles Russell. — I assure you it is not a sworn statement at all. We make no comment upon it. It is, of course, a statement to be received with respect; but it is not sworn to.

Mr Coudert. — Then I will read from page 367; and it is best to refer to the passage :

I, J. M. Crawford, Consul-general of the United States at St Petersburg, do hereby certify that Nichola A. Grebnitzki, military chief of the Commander Islands, appeared before me this day and declared, under oath, that all the statements contained in the foregoing article, etc.

I am glad that my learned friends on the other side when they spoke of attributing had not read this, and evidently were misled by thinking of some other paper; or they would not have said this, nor would they have said it was unsupported by any details of fact because Mr Grebnitsky gives these details of counting two lots of skins. Nothing can be more detailed than that; and if I were not anxious to save the time of the Tribunal, — it is only my anxiety to save the time of this High Tribunal that prevents my reading the whole of that; but I would recommend its perusal to the members of the Court, and I think they will be repaid.

Now Messrs C. W. Martin and Sons examined these same skins, or a portion of them, after they reached London; and found them to consist of the following : Females, 83.76 per cent; males, 1.66 per cent, and of sex doubtful 14.58 per cent. You will see that they substantially agree if you make a reasonable allowance for what he calls those skins that were doubtful.

We then have the testimony of Mr. Loud, the Assistant Treasury Agent of the United States on the Pribilof Islands :

In July, 1887, I captured the poaching schooner *Angel Dolly* while she was hovering about the islands. I examined the sealskins she had on board, and about 80 per cent were skins of females. In 1888 or 1889, I examined something like

5,000 skins at Unalaska which had been taken from schooners engaged in pelagic sealing in Behring Sea, and at least 80 to 85 per cent were skins of females.

Then Mr. Malowansky, who is one of the men who has been cited by both sides, or, at all events, commented upon by both sides, and whose opportunities for acquiring knowledge were exceptional.

He has resided on the Commander Islands nine years as agent of the lessees, and is well acquainted with all matters pertaining to the sealing business.

He says:

(*Case of the U. S. App.*, Vol. II, p. 197).

In 1891 the schooner *J. H. Lewis* was caught near the islands by the Russian gunboat *Aleut* and found to have 416 skins on board. I made a personal examination of these skins, and found that from 90 to 95 per cent were those of female seals. I called the attention of the English Commissioners, Sir George Baden-Powell and Dr. G. M. Dawson, to this fact when they visited the islands in 1891, showing them the skins. I opened a few bundles of the skins for their inspection and offered to show all of them, but they said that they were satisfied without looking at any more than those already opened. I remember that a schooner from Victoria was also seized at the islands about three years ago by the Russian authorities with 33 skins on board, which were nearly all taken from female seals.

Then Mr. Morgan is the next witness, whose testimony we produce.

(*Case of the U. S. App.*, Vol. II, p. 65.)

Mr. Morgan has resided at the Pribilof Island as agent of the lessees of the Government for a great number of years. He was there first in 1868 and 1869 and was there continuously during each sealing season from 1874 to 1887. In 1891 he went to the Commander Islands and spent the sealing season there.

This is what he says :

I have personally inspected the skins taken upon the three schooners *Onward*, *Carolina* and *Thornton*, which skins taken in Behring Sea were landed in Unalaska, and were then personally inspected by me in the month of May, 1887. The total number of skins so examined by me was about 2,000, and of that number at least 80 per cent were the skins of females. I have also examined the skins taken by the United States revenue cutter *Rush* from one of the North Pacific Islands, where they had been deposited by what is known as a poaching schooner and taken to Unalaska, which numbered about 400 skins, and of that 400 skins at least 80 per cent were the skins of female seals. I have also examined the skins seized from the *James Hamilton Lewis* in the year 1891, by the Russian gun-boat *Aleute*, numbering 416, of which at least 90 per cent were the skins of female seals.

Then Captain L.-G. Shepard, an Officer of the U. S. Revenue Marine, who says :

(*Ibid.*, p. 189.)

I examined the skins from the sealing vessels seized in 1887 and 1889, over 12,000 skins, and of these at least two-thirds or three-fourths were the skins of females. Of the females taken in the Pacific Ocean, and early in the season in Behring Sea, nearly all are heavy with young, and the death of the female necessarily causes the death of the unborn pup seal ; in fact, I have seen on nearly every vessel seized the pelts of unborn pups, which had been taken from their mothers. Of the females taken in Behring Sea nearly all are in milk, and I have seen the milk come from the carcasses of dead females lying on the decks of sealing vessels which were more than 100 miles from the Pribilof Islands.

(*Ibid.*, p. 419.)

Then Commander **Nelson** of the United States Navy seized the British schooner *Mountain Chief* for sealing in Behring Sea in 1892 in vio-

lation of the terms of the *modus vivendi*. In the declaration of seizure he states incidentally that there were found on her deck 7 seals which had not yet been skinned, six of which were females.

The President. — Before you pass to another topic, will you allow me to ask you this? There is an allusion in some of the extracts that you have been reading, to the action of the Russian fleet or the Imperial Russian Navy. Are you able to give us any information about that action of the Imperial Russian Navy as to its limits and origin?

Mr Coudert. — I do not think I have quite caught what the learned President wants to know.

The President. — In the deposition of John Malowansky, and I believe also in the deposition of Mr Morgan, allusion is made to seizures by the Russian Navy. I would like to know if you are able to give us any information as to the extent of this action of the Imperial Russian Navy as well in point of date as in point of locality and also perhaps as to the ground upon which this action rested, whether it was founded upon some arrangement between the Russian and American Governments. It is out of our case, I acknowledge, but I would enquire from you the same information on that.

Mr Coudert. — Yes, I have some information on that, and with your permission I will give it you later, if you will permit. I will proceed with the regular line of my argument later, but I will look up the evidence that we have on this, and I shall be happy to give it you.

The President. — If you please.

Mr Coudert. — I will now give the learned Court extremely valuable evidence emanating from the best possible source, namely, the British furriers, who are men of very high character, and it is not possible to disparage their testimony either as to its moral quality or legal effect. If that does not establish the point that we have undertaken to prove, then it is not provable, but we have cumulated it and piled Pelion upon Ossa so to say. We have got the British testimony; there is an enormous mass of it, and we have the admissions of our friends on the other side which practically admit all we claim, but we are not satisfied with that; we are unreasonable enough to ask for more, and we ask for the patience of the Court while we give some important British declarations on the subject.

I want to read to you a letter from Sir George Baden-Powell published in the *London Times*, November 30th, 1889. Sir George Baden-Powell was, as the Court remembers, one of the British Commissioners. He says:

As a matter of fact the Canadian Sealers take very few, if any, seals close to the islands. Their main catch is made far out at sea, and is almost entirely composed of females.

This is the gentleman who signed the report recommending that there be a closed zone twenty miles round our islands. Then the extract from

Volume 3 to Case of Great Britain (page 1) Rear-Admiral Sir Mr Culme-Seymour of the British Navy to Admiralty.

(Telegraphic) Victoria, August 24, 1886. Three British Columbian seal schooners seized by United States Revenue cruiser *Corwin* Behring Straits, seaward 70 miles from off the land killing females and using fire arms to do it, which they have done for three years without interference although in Company with *Corwin*.

Now you will see that this blunt sailor who is sending his despatch by telegraph and had no word to waste says just what would be approximately said to be the fact.

They are killing females with a "shot gun" — it may be they were only 90 or 80 per cent, but when it comes so near a totality they would say "they are killing females" and that is the fact, and what they were doing. And that was at sea too.

Then we have an extract which is important also of a despatch of Rear-Admiral Hotham of the British Navy to Admiralty.

Extract

Warspite, at Esquimalt, Sept. 10, 1890.

I have to request you will bring to the notice of the Lords Commissioners of the Admiralty this letter with reference to my telegram of the 8th instant.

I personally saw the masters of the sealing-schooners named below, and obtained from them the information herein reported :

Captain C. Cox, schooner "Sapphire".

Captain Petit, schooner "Mary Taylor".

Captain Hackett, schooner "Annie Seymour".

Captain W. Cox, schooner "Triumph".

.....
They also mentioned that two-thirds of their catch consisted of female seals, but that after the 1st July, very few indeed were captured "in pup", and that when sealing outside the Behring Sea, round the coast, on the way up, (where this year the heaviest catches were made), they acknowledged that seals "in pup" were frequently captured.

Then there is the deposition or an extract from the deposition of Edward Shields a sealer on board the *Carolina* seized in 1886. This testimony would seem to be worth consideration, for it is taken by the British Government and offered as testimony that ought to be considered :

(*B. C. App.*, Vol. III, *U. S.*, N° 2, 1890, p. 8)

I, Edward Shields, of Sooke District, Vancouver Island, a hunter engaged on board the British schooner *Carolina* of 31.90 registered tonnage, do solemnly and sincerely declare that I left Victoria on board the aforesaid schooner on the 20th May 1886, bound on a voyage to Behring's Sea for the purpose of sealing... We sailed to Behring Sea and commenced sealing on the 15th June, and at that time we were about 300 miles from land, and we continued cruising about for seals and up to the time the United States vessel "*Corwin*" seized us we had 686 sealst *During the whole time we were cruising we were in the open sea, out of sight of any land. The seals we obtained were chiefly females.*

We are not vouching for the veracity of this witness but he is offered to the Court by the other side as a witness whose testimony should be considered.

Mr Justice Harlan. — Does the witness mean that they sailed *into* Behring sea? He says we sailed *to* Behring sea.

Mr Coudert. — I presume he meant we entered Behring sea. His vessel was seized there. He commenced on the 15th June to seal in Behring sea.

Sir Charles Russell. — I do not know I am sure.

Mr Coudert. — Now we have an extract from reports of the Departments of Fisheries of Canada 1886 by Thomas Mowat, Inspector of Fisheries for British Columbia. This is cited in the British Case Appendix Volume 3, and therefore is doubly important. He says :

(Page 173. *U. S.* n° 2, 1890.)

There were killed this year so far, from 40,000 to 50,000 fur-seals, which have been taken by schooners from San Francisco and Victoria. The greater number were killed in Behring Sea and were nearly all cows or female seals. This enormous catch with the increase which will take place when the vessels fitting up every year are ready will, I am afraid soon deplete our fur-seal fishery, and it is a great pity such a valuable industry could not in some way be protected.

and two years later — this in the extract from Reports of the Department of Fisheries for British Columbia, and he says :

Cited in U. S. Case, p. 201.

The majority of our hunters contend that there are over 7 per cent of pups in the entire catch of fur-seals on the coast; while in Behring Sea the catch does not exceed one per cent. But, *they cannot deny the fact that over 60 per cent of the entire catch of Behring Sea is made up of female seals.*

You will observe, Mr President, that at this time the British Authorities in Canada were taking the same view that we are, and they were trying to protect not only our seals on the Island, it is true, but the fur business on the sea; and they saw (because they are intelligent gentlemen) that this business was ruinous to the herd upon which these men relied and when they were trying to extract the fact from the sealers, the sealers minimised and minimised but were compelled to admit as they say, for they could not deny the fact, that over 60 per cent of the entire catch of the Behring Sea was made up of female seals. One single official extract more, and I will pass from this.

The President. — I would first like to ask, Mr Tupper, is Mr Mowat still in your Service?

Mr Tupper. — No; Mr Mowat is dead.

Mr Coudert. — Now, I want to complete the reading of official papers, which reading would not be satisfactory if we did not include something from our accomplished friend Mr Tupper. I am bound to say that I had promised him I would not read any more from him; but the temptation is too much for me, and besides there was no consideration for the promise; so, if he will pardon me, I will read a brief extract which puts the cap upon it, — as you would say, Mr President, « le couronnement de l'édifice ». Mr Tupper writes to the Sealer's Association. I refer to

a letter of the 13th of June at page 195, and also at pages 90 and 91. Let me preface the reading of this brief extract with the remark that it is doubly important not only on the subject I am reading now, but on the question of damages; and we cannot help thinking it is a little ungracious on the part of my friends on the other side to ask us to pay damages to them, after we have surrendered our business to their sealers and they have largely profited by the circumstance. It is evident that they must have made a large profit out of the *modus vivendi*, partly because they did not observe it and, therefore, it did not hurt them, and partly because we did not put any skins on the market and they had the full control of it, and partly because they intercepted the seals before they entered the Behring Sea which had an appearance of legality; and their business was very prosperous, in fact they never made so much money as appears from the Case; and when they ask us to pay damages in addition, we think it is rather an ungracious demand.

That is on the question of damages; but, on the question of pelagic sealing, the letter of Mr Tupper is important. This letter is addressed to the Sealer's Association.

Gentlemen; Reverting to my letter to you of the 13th June on the subject of your communication of the 5th of that month, on behalf of the Sealers' Association of Victoria, remonstrating against the proposed *modus vivendi* in Behrings' Sea, I have now the honour to inform you that Her Majesty's Government is of opinion that the total cessation of sealing in Behring's Sea will greatly enhance the value of the produce of the coast fishery, and does not anticipate that British sealers will suffer to any great extent by exclusion from Behring's Sea.

The opinion of Her Majesty's Government on this is, of course, of very great value. It is not formed lightly or without having information; and when the Government expressed the opinion, which is reiterated by our friend Mr Tupper, that the cessation of sealing in Behring Sea would greatly enhance the value of the produce the coast fishery, the Government was absolutely right; and the result has shewn it, and the tables that I have read show that Her Majesty's Government showed a great deal of foresight, just the foresight that we would expect, in the protection of the rights of British citizens.

Now, we come to the testimony of the Victorian Sealers; and a deposition of some 29 witnesses at Victoria was taken.

Sir Charles Russell. — You mentioned another page 105.

Mr Coudert. — I said that that was the crown of the edifice; but, if I have time, I will read anything you desire me to read.

As I have said, we took the depositions of about 29 witnesses at Victoria; and nothing can show better the strong desire of the United States to reach all sources of knowledge, — they went to Victoria to get information to be used against pelagic sealing, which certainly showed a great deal of boldness. It is not to be presumed that any of them were friendly to the United States. We, as I say, examined 29 of these witnesses. How many were cross-examined by our friends on the other side, we do

not know; but we do know that the cross-examination of ten of these witnesses is produced in the case? Why the others were not cross-examined, or why the cross-examination, if taken, was not produced, we can only conjecture?

The first of them is Peter Anderson, a boat-steerer. He had sailed in the last three years on the *Black Diamond*, *Ariel* and *Umbrina*, all British shooners. He says:

The large majority of seals taken on the coast and in Behring Sea are cows with pups in the Pacific Ocean and with milk in Behring Sea. A few young male seals are taken in the North Pacific Ocean from two to three years old. Have taken females that were full of milk 60 miles from the Pribilof Islands.

And Bernard Bleidner was out in 1887 and 1889. He sealed in the North Pacific.

Most all were females and had pups in them. I think fully two-thirds of all we caught were females and a few were bulls.

Then Niels Bonde, of Victoria, Sealer, has been for four years in this business.

The President. — We are struck by the appearance of Scandinavian names, here.

Mr Coudert. — Yes. Wherever anything is done on the high seas, you will be sure to find their names. They found their way to America before Columbus.

The President. — Yes, the successors of the ancient Vikings, no doubt; but I suppose these people did their business under the British or American flags? It is not a case of the Scandinavian flag appearing on these scenes?

Mr Coudert. — No; there was no Scandinavian flag.

Niels Bonde, of Victoria, Sealer, has been out four years on sealing schooners from Victoria, namely from 1887 to 1890 inclusive. He says:

The seals caught along the coast after the first of April was mostly pregnant females and those caught in Behring Sea were females that had given birth to their young. I often noticed the milk flowing out of their breasts when being skinned and have seen them killed more than 100 miles from the seal islands. I have seen live pups cut out of their mothers and live around on the decks for a week.

Then he was crossexamined, and he says this:

That on each of said vessels (namely the four he had served on) I had more or less to do with skinning the seals, and would say that about 60 per cent on the coast were females and about 50 per cent in Behring Sea. I distinguish the male skin from the female by the absence of teats.

Then **Thomas Brown**, of Victoria, Sealer, says of 1889:

Most all the seals that we shot and secured were females and had young pups in them and we would sometimes skin them.

He says of 1890:

We were sealing about three months and got about 400 seals, most all females... We did not enter Behring Sea, and returned to Victoria in April. Our catch was fully 80 per cent females.

He says of 1891:

Commenced sealing off Cape Flattery, and all the seals which we caught were pregnant females.

So that the Admiral, if it was the same thing, was literally right when he said they were killing females with shot-guns.

Then **Christ Clausen**, of Victoria, Master Mariner.

Acted as mate in 1889. Was navigator on schooner *Minnie* in 1890.

My catch that year was 2600, of which about two thousand were caught in Behring Sea.

Acted as navigator on same vessel in 1891.

The seals we catch along the coast are nearly all pregnant females. It is seldom we capture an old bull, and what males we get are usually young ones. I have frequently seen cow seals cut open and the unborn pups cut out of them, and they would live for several days. This is a frequent occurrence. It is my experience that fully 85 per cent of the seals I took in Behring Sea were females that had given birth to their pups, and their teats would be full of milk. I have caught seals of this kind from 100 to 150 miles away from the Pribilof Islands.

Then **Greenleaf**, a Master Mariner of Victoria, says :

Since 1882 I have been interested in the sealing business, and I am well acquainted with it and the men engaged in it and the methods they employ. I am acquainted with the hunters and masters who sail from this port, and board all incoming and outgoing vessels of that class. These men all acknowledge that nearly all the seals taken off the Pacific Coast are females, and that they are nearly all with young.

I have also learned by conversation with Behring Sea hunters that they kill seal cows 20 to 200 miles from the breeding grounds and that these cows had recently given birth to young. I have observed in the skins that the size of the teats show either an advanced state of pregnancy or of recent delivery of young.

The British Government has made an attack upon Greenleaf by endeavouring to connect him with smuggling operations. I do not know whether he would object to being connected with smuggling operations, or if any of them would. It is so common, I understand there that it has, almost reached the point of being legitimate. As to the moral difference, which is the better and which is the worst, killing and ripping up gravid females, or smuggling a little whisky into a desolate place to cheer up the natives, I do not know which is the worst, but fortunately it is not my task to enlighten the Court on that.

Then **Arthur Griffin** a sealer

We went sealing in 1890.

Began sealing off the northern coast of California, following the sealing herd northward capturing about 700 seals in the North Pacific ocean, two-thirds of which were females with pup, the balance were young seals, both male and female. We entered the Behring Sea on July 31st through Unimak Pass and captured between 900 and 1000 seals therein, most of which were females in milk.

Of the following year which is 1891 he says :

We captured between 900 and 1000 on the coast, most all of which were females with pups. We entered the sea July 12th through Unimak Pass and captured about 800 seals in those waters, about 90 per cent of which were females in milk... and we captured females in milk from 20 to 100 miles from the rookeries.

The learned Arbitrators will observe that none of these witnesses pretend that they caught seals within 20 miles of the Island. I think there is only one exception to that, where it is spoken of as 15, but as a rule they all say it is beyond 20 miles.

Then **James Harrison**, of Victoria, Sealer.

He went out sealing in 1891 and 1892. He relates his experience in 1891 as follows :

We commenced sealing right off the coast ; went as far south as the California coast and then hunted north to the west coast of Vancouver Islands ; caught 500 skins during the season ; almost all of them were pregnant females : out of a hundred seals taken about 90 per cent would be females with young pups in them ; I can't tell a male from a female while in the water at a distance. On an average, I think the hunters will save about one out of three that they kill.

This is on the question of waste by missing and wounding.

But they wound many more that escape and die afterwards. We entered the Behring Sea about the 1st of June, and caught about 200 seals in those waters. They were mostly mothers that had given birth to their young and were around the fishing banks feeding. The hunters used shotguns and rifles. In the Behring Sea we killed both male and female, but I do not know the proportion of one to the other.

Then **James Hayward**, of Victoria, Sealer.

He went out sealing in 1887, 1888, 1890 and 1891. His vessels appear to have made large catches. He makes the following statement :

Most of the seals killed on the coast are pregnant females, while those we killed in the Behring Sea after the 1st of July were females that had given birth to their young on the seal Islands and come out into the sea to feed. Have caught them 150 miles off from the shore of the seal islands, and have skinned them when their breasts were full of milk. Seals travel very fast and go a long way to feed.

Then the next witness says :

A very large majority of the seals taken in the North Pacific Ocean are cows with pup, and the majority of seals taken in Behring Sea are cows with milk... I have taken female seals eighty miles off the Pribilof Islands that were full of milk.

Then **Joshua Stickland**, of Victoria, Sealer.

He has been in the sealing business two years on the British schooner Umbrina. He says :

Most of the seals are females with pup... Have killed cow seals that were full of milk over 40 miles from the Pribilof Islands.

Then **Alfred Dardean**, of Victoria, Sealer.

He went sealing in 1890.

We caught over 900 skins before entering the sea and our whole catch that year was 2,159 skins. Of the seals that were caught off the coast fully 90 per cent out of every hundred had young pups in them. The boats would bring the seals killed on board the vessel and we would take the young pups out and skin them. If the pup is a good, nice one we would skin it and keep it for ourselves. I had eight such skins myself. Four out of five if caught in May or June, would be alive when we cut them out of the mothers. One of them we kept for pretty near three weeks alive on deck by feeding it on condensed milk. One of the men finally killed it because it cried so pitifully. We only got three seals with pups in them in the Behring Sea. Most all of them were females that had given birth to their young on the islands, and the milk would run out of the teats on the deck when we would skin them. We caught female seals in milk more than 100 miles off the Pribilof Islands.

This witness had the distinction of being cross-examined by the British Government and we say he does not deny anything but adds.

Major Williams' Clerk or secretary gave me \$2 for the replies I gave to questions asked me by the Major at the Driard Hotel.

This is produced by the other side.

Sir Charles Russell — There is an earlier statement than that.

Mr Coudert — Shall I read the whole of it.

Sir Charles Russell — If you please.

Mr Coudert. — Certainly.

I consider I know as much about sealing as any of the sealers out of this port. I studied the habits of the seals closely while on my sealing voyage. I consider half the seals caught by the schooner E. B. Marvin during the time I was aboard of her were female seals, and a large portion of those female seals, were barren.

Sir Charles Russell — That is the point.

Mr Coudert. — Yes I beg your pardon. If I had observed it I would have read it :

Major William's clerk or secretary gave me \$ 2 for the replies I gave to questions asked me by the Major at the Driard Hotel. I did not read the evidence which I signed for Major Williams at the Driard Hotel.

The most that can be said of this is if Dardean was bought he was bought cheap but probably it was as much as he is worth. Out of justice to Major Williams it ought to be said that there is nothing unusual in paying a man a fee for his time. It is a witness's fee, and the mere fact that it was so small a fee given to a man taken away from his business show that the transaction was highly honorable and creditable. He does minimise his testimony here in the way I have read and my learned friend was quite right in asking me to read it.

Then **Morris Moss**, Furrier and Vice-President of the Sealers Association of Victoria, who has bought from ten to twenty thousand sealskins per annum.

I believe the majority of seals captured by white hunters in Behring Sea are females in search of food.

As Vice-President of the Sealers Association his information must have been of the very best; he would not have spoken without full knowledge of the subject he was talking of.

Then **J. Johnson**, of Victoria, Sealer and Sailing Master, who has spent six years of his life sealing, and been captain of four different schooners :

A large majority of the seal taken on the coast are cows with pups. A few young males are taken, the ages ranging from one to five years. Once in a while an old bull is taken in the North Pacific Ocean. I use no discrimination in killing seals, but kill everything that comes near the boat in the shape of a seal. . . . The majority of the seals killed in Behring Sea are females. I have killed female seals 75 miles from the Islands that were full of milk.

Then **Victor Jacobson**. He is a British subject and has been engaged for 11 years in sealing, 10 years as master. He is apparently a reputable man as he appears for the British Government on the question of damages. They have produced him and he may presumably be relied upon. He says :

The females seals go through the passes from the Pacific Ocean into Behring Sea between June 25th and guly 15th. Females killed previous to this time I found with pup but none with pups after that latter date. I have killed female seals with milk 200 miles from the Pribiloff Islands. I think of the seals taken by me that three in five are females, and nearly all with pup.

And in connexion with this he is crossexamined and he states :

My experience has been that about three out of five seals taken on the coast are females, and about the same in Behring Sea.

This witness has nothing further to say in his cross-examination on the subject of females :

Then we have the testimony of **Edwin P. Porter**. He says :

My experience in four years sealing is that nearly all the seals taken along the coast are pregnant females, and it is seldom that one of them is caught that has not a young pup in her. In the fore part of the season the pup is small, but in *May and June*, when they are taken off the Queen Charlotte and Kodiak Islands the unborn pup is quite large, and we frequently take them out of the mothers alive. I have kept some of them alive for six weeks that were cut out of their mothers by feeding them, on condensed milk. The seals we captured in Behring Sea were fully 80 per cent females that had given birth to their young. A fact that I often noticed was that their teats would be full of milk when I skinned them, and I have seen them killed from 20 to 100 miles from the seal islands.

Then **Charles Petersen**, of Victoria, Sealer.

He went out sealing in 1886, 87, 90, and 1891. As to 1887 he says :

We entered the Behring Sea about the 15th of August through the Unimak Pass and captured therein 140½ seals, most of which were cows in milk. On that voyage we caught female seals in milk over eighty miles from the rookeries where they had left their young... I have seen the deck almost flooded with milk while we were skinning the seals... Ninety per cent of all the seals we captured in the water were female seals.

The testimony I will now read and which will close this branch of the subject, at least as far as the Victoria testimony is concerned is the testimony of Mr **Mc Manus**. He is an intelligent man and a journalist.

He spent the summer of 1891 on the schooner *Otto* which hunted for nine days in Behring Sea. Following are some extracts from the journal he kept.

This is the testimony of a man who noted down what he saw and the impressions he had from day to day. He is a British subject and a resident of Victoria :

Tuesday, 25 August, rain in morning. Boats and canoe out at half past 9 o'clock ; out all day (returning to dinner). Result : First boat, two seals reported, wounded and lost five ; seals said to be shy and wary, and not so numerous as formerly ; attention called to cow seal being skinned (which I had taken for a young bull). The snow white milk running down blood-stained deck was a sickening sight. Indian canoe, one seal. Total, 3 seals ; 2 mediums and 1 cow.

Wednesday, 26 August, cloudy morning ; seals floating round schooner. Boats and canoe out all day. Result : First boat, 1 seal ; second boat, none ; Indian canoe, 10 seals ; total, 11 seals ; 8 cows in milk, and 8 medium. Skipper in first boat blamed the powder. Second boat said it was too heavy and clumsy for the work. Skipper reported having wounded and lost 7, and the men in second boat 9 ditto, 16 in all. Skipper said seals not so numerous as formerly, more shy, also blamed the powder. Evidently a great deal of shooting and very few seals to correspond.

Saturday, 29 August, ship's cook brought down from deck a large cow seal at 40 yards rise. Boats and canoe out all day ; fine, clear, balmy weather ; Aleutian Island in sight. Result ; First boat, three seals ; second boat, three seals ; cook, from deck, one ; Indian canoe, ten ; total catch, seventeen seals, greater proportion cows in milk ; horrid sight, could not stay the ordeal out till all were flayed. A large number reported as wounded and lost. According to appearances, slaughter indiscriminate.

Sunday, 30 August. Result of hunt : First boat, two seals ; sea-boat, one ; Indian canoe seven ; total, ten seals, seven of which were cows in milk. Several, as usual, reported wounded and lost by the boats. The great superiority of the Indian spear evident.

I want to say, in connection with this gentleman, that his testimony is confirmed by Mr King Hall, a son of the British Admiral of that name, Sir William King Hall, he was on board as a correspondent. I have not

taken it out, it will be found in the United States' Case, Volume 2, pages 332 to 334, and the Tribunal will be much interested in reading it.

Now that we have given this testimony, it may be proper to read what the British Commissioners, in their Report, express as their views with regard to pelagic sealing.

Those views may be specially noted in connection with the foregoing descriptions of how gravid nursing females are killed :

By the pelagic sealers and by Indian hunters along the coast, fur-seals of both sexes are killed, and, indeed, it would be unreasonable, under the circumstances, to expect that a distinction should be made in this respect, *any more than that the angler should discriminate between the sexes of the fish he may hook.*

That I have read before. Then 610.

The accusation of butchery laid against those who take the seals on shore cannot be brought against this pelagic method of killing the seal, which is really *hunting* as distinguished from *slaughter*, and in which the animal has what may be described as a *fair sporting chance for its life.*

[The Tribunal then adjourned for a short time.]

The President. — Mr Coudert, we are ready to hear you.

Mr Coudert. — When this learned Tribunal adjourned for the recess, I had just read extracts from the British Commissionners' Reports charging butchery against those who killed the seals on the island, and expressing the opinion that the slaughter which I have described at sea was sportsmanlike in its character in that it gave the animal a fair sporting chance for its life. I could not do justice to that by any comment, and I have it for the Tribunal without any criticism.

I proceed now with what we call the American evidence. The Tribunal will observe that the United States, in offering this proof to this Tribunal, could give no other evidence of its respect for the nature of the Court than its evident attempt to get all the best evidence on the subject that it was possible to secure. We have produced before you the Furriers of all the nations where these articles are dealt with.

We have even given you the testimony of our adversaries the Canadian sealers. We have given you the evidence of high official gentlemen on the other side, and I now propose to read (and not to any great extent), some of the American evidence, repeating that this small pamphlet only contains extracts from a part of the depositions.

I will now read the evidence of Captain C. F. Hooper, of the United States Revenue Marine (*U. S. Counter*, page 214). Captain Hooper made extensive official investigations in regard to seal-life on the Pribiloff Islands, in Behring Sea and the North Pacific Ocean in 1891, and 1892. In the course of these investigations he captured, between July 24 and August 31, 1892 forty one seals in Behring sea.

Of course, he made no effort to capture any large number, but his effort was to ascertain scientifically what the real condition of things was then, and he secured a sufficiently large number to guess, if you please, at what might be the fact with regard to the whole business. He secured

41 seals and examined them, and of those he found that there were of old males only 1, young males 11, nursing cows 22, and virgin cows 7. That is stated in full in the American Counter Case, page 219.

Now this is his language, on page 213 :

Since leaving San Francisco on March 9, the *Corwin* has steamed 16,200 miles, and 8,713 miles since the date of my reporting for duty as part of the Behring Sea fleet. Of this distance 5,567 miles were steamed in Behring Sea.

. . . I find in general, as one of the results of my investigations, that more than two-thirds of the seal taken are cows now having young or capable of bearing them at no distant day; that it is impossible to discriminate as to age or sex of seals while in the water, except in the case of young pups and old bulls; that even under the most favourable conditions a large percentage is lost by sinking or wounding, and that by reason of the tameness of the nursing cows, which form the larger part of the seals seen, pelagic hunting in Behring Sea is peculiarly destructive and unless stopped will wholly exterminate the already greatly depleted herds.

I do not believe that it is possible to indicate any zonal limit in Behring Sea beyond which pelagic sealing could be carried on, and at the same time preserve the seals from complete annihilation. Further, I wish to renew a statement contained in a former report made to the honourable Secretary of the Treasury, that unless supplemented with protection in the Pacific Ocean, no amount of protection in Behring Sea will preserve the herds.

Now Captain Hooper's testimony is commented on in the argument of our friends on the other side, on pages 108-9, and this is what they say :

The United States revenue Cutter *Corwin* Captain Hooper, was occupied for twenty-six days in hunting seals during the summer of 1892. The whole number of seals killed however appears to have been but forty-one, a result small as to evidence either in experience, or in competent hunters. Of this number twenty-nine are stated to have been females, a proportion which does not differ very largely from that given by several of the pelagic sealers, but which upon so small a total number means little as compared with the experience embodied in their statements.

As far as mere experience is concerned, of course it does not; but I take this to be an acknowledgment that the testimony given by, at least some of the witnesses on the other side, — the pelagic sealers, — agrees with the testimony of Captain Hooper, and he made out that some 70 per cent. or upwards were females.

Charles H. Townsend, Naturalist, attached to the U. S. Revenue Cutter "*Corwin*" in 1892.

(*Counter case of the U. S.*, pp. 392, 394.)

As already stated above, I was attached to the steamer *Corwin* during the past summer, and I made all the examinations of the stomachs of the seals referred to in Captain Hooper's report, covering, in all, thirty-three seals. I annex hereto photographs of two of the seals which were dissected and examined by me on the deck of steamer *Corwin*. These seals were taken on the 2nd day of August, 1892, at a distance of about 175 miles from the islands. The photographs exhibit the mammary glands and convey a good idea of the considerable size of these glands, which in all cases were filled with milk. The inference is unavoidable that the pup is a voracious feeder, and this inference is in keeping with the observations I have made on the rookeries where I have repeatedly seen pups suckle for half an hour at time. The milk glands are quite thick and completely charged with milk. The photographs (opposite p. 394) especially the first one, exhibit the milk streaming from the glands on to the deck.

Annexed to the report of Captain Hooper is a table giving the results of the examination of forty-one (41) seals which were killed in Bering Sea in 1892. It appears that of this

number twenty-two (22) were nursing seals. The photographs hereto annexed show exactly the way all of these nursing female seals looked when cut open on the deck of the *Corwin*.

The next is

Captain L. G. Shepard, U. S. Revenue Marine.

(*Case of the U. S., Appendix*, vol. II, p. 187.)

I am 45 years of age; a resident of Washington, D. C., and am Captain in the U. S. Revenue Marine Service, chief of division Revenue Marine, Treasury Department. In command of the revenue steamer *Rush*, I made three cruises to Behring Sea in the years 1887, 1888, and 1889 for the purpose of enforcing existing law for protection of seal life in Alaska and the waters thereof... I hereby append to and make a part of this affidavit a table, marked A, giving the names of the vessels seized by me in Behring Sea while violating the law of the United States in relation to the taking of fur-bearing animals.

I examined the skins taken from sealing vessels seized in 1887 and 1889, over 12,000 skins and of these at least two-thirds or three-fourths were the skins of females. Of the females taken in the Pacific Ocean, and early in the season in Behring Sea, nearly all are heavy with young, and the death of the female necessarily causes the death of the unborn pup seal; in fact, I have seen on nearly every vessel seized the pelts of unborn pups, which had been taken from their mothers. Of the females taken in Behring Sea nearly all are in milk, and I have seen the milk come from the carcasses of dead females lying on the decks of sealing vessels which were more than 100 miles from the Pribilof Islands. From this fact, and from the further fact that I have seen seals in the water over 150 miles from the islands during the summer, I am convinced that the female, after giving birth to her young on the rookeries, goes at least 150 miles, in many cases, from the islands in search of food. It is impossible to distinguish a male from a female seal in the water, except in the case of a very old bull, when his size distinguishes him. Therefore open sea sealing is entirely indiscriminate as to sex or age.

The next is

Captain Bryant, U. S., Treasury Agent.

(*Quoted in U. S. Counter Case*, p. 84.)

Writing of the year 1870 he states :

Formerly in March and April the natives of Puget Sound took large numbers of pregnant females.

The next is

H. H. Mc Intyre, Special Agent of the U. S. Treasury Dept.

(*Counter case of the U. S.*, p. 84.)

It may also be stated in support of this supposition that nearly all the five thousand seals annually caught on the British Columbian coast are pregnant females taken in the waters about the 1st of June while apparently proceeding northward to the Pribilof group.

(This statement is contained in an official report, dated December 9, 1869 and published in Senate Ex. Doc. No. 32, 41st Cong. second Sess., p. 35.)

We then have the testimony of :

Captain Daniel Mc Lean.

(*Case of U. S., Appendix*, vol. II, p. 443.)

He is a Nova Scotian by birth, and one of the best known sealing captains. Mr Thomas Mowat, Canadian Inspector of Fisheries makes the following statements with reference to this witness : " Capt. Donald (Daniel) Mc Lean, one of our most successful sealing captains, and one of the first to enter into the business of tracking

seals from California to Behring Sea ", etc..... And again : " Capt. Donald Mc Lean and his brother are expert sealers." (See reports of Department of Fisheries of Canada, 1886, p. 247.)

Capt. Mc Lean has been engaged in pelagic sealing for 11 years as master of vessels and deposes in part as follows :

Q. Of what sex are the seals taken by you, or usually killed by hunting vessels in the North Pacific and Behring Sea? — *A.* Females

Q. What percentage of them are cows? Suppose you catch 100 seals, how many males would you have among them? — *A.* About 10.

Q. What percentage of the cows taken are with pup? — *A.* The females are mostly all with pup, that is, up until the 1st of July.....

Q. Have you noticed any decrease in the quantity of animals in the last few years? — *A.* Yes, Sir.

Q. To what do you attribute the cause? — *A.* Killing of the females.

Q. If sealing continues as heretofore, is there any danger of exterminating them? —

A. Yes, Sir; they will all be exterminated in three years, and there will be no more sealing.

Q. Do you think it is absolutely necessary to protect the cows in the Behring Sea? —

A. Yes, Sir.

Capt. Alexander Mc Lean, brother of the above witness, who is also termed an expert sealer by Mr Mowat, bears out fully the foregoing. (*Case U. S., Appendix*, vol. II, p. 436.)

The next is

James Kiernan, of San Francisco, sealing captain.

(*Case of the U. S., Appendix*, vol. II, p. 449.)

He has been engaged in sealing for many years since 1843, his early experience being in South America where the rookeries have now to a great extent been destroyed. He made his first sealing voyage in the North Pacific in 1868 and has, in more recent years, been in Behring Sea.

My experience has been that the sex of the seals usually killed by hunters employed on vessels under my command, both in the ocean and Behring Sea, were cows. I should say that not less than 80 per cent of those caught each year were of that sex. I have observed that those killed in the North Pacific were mostly females carrying their young, and were generally caught while asleep on the water, while those taken in the Behring Sea were nearly all mother seals in milk, that had left their young and were in search of food.

The mother does not leave the rookery in search of food until she has dropped her young and become pregnant again, hence when she has been slain, it means the loss of three, as the young pup will unquestionably die for lack of sustenance.

Then we have.

Captain Charles Lutjens, of San Francisco, owner and master of sealing schooner.

(*Case of the U. S., Appendix*, vol. II, p. 121.)

He has been engaged in the sealing business as master since 1886, with the exception of two years.

Q. Do you know of what sex the seals were that you have taken in the Pacific and Behring Sea? — *A.* Principally females.

Q. What percentage of the skins you have taken were cows? — *A.* About 90 per cent.

Q. What percentage of the cows you have taken were with pup? — *A.* About 70 per cent, I should say.

This witness was subsequently cross-examined by the British Government. (See *British Counter Case, Appendix*, vol. II, p. 121.) He there states :

Of my catch along the coast going north four-fifths would be females, and I

think about four-fifths would be carrying pups. That agrees with the testimony, 80 per cent.

Very few old bulls are caught. The proportion of males to females in the Behring Sea appears to me to be about the same, but the cows are then in milk, and I have seen the cows caught in milk as far as 150 miles from the islands. About one-fifth of the cows taken are barren.

Then we have the testimony of **Franck Moreau**, of San Francisco, sealer.

(*Case of the U. S. Appendix*, vol. II, 467.)

Q. Have you been engaged in catching seals in the Pacific and Behring Sea, and for how long? — A. For five or six years I have been catching seals.

Q. Do you know of what sex the seals were that you have taken in the Pacific and Behring Sea? — A. Mostly females.

Q. What percentage of the skins you have taken were cows? — A. I should judge about 90 per cent.

Q. What percentage of the cows you have taken were with pup? — A. About 75 per cent were with pup.

This witness was subsequently cross-examined by the British Government (See *British Counter Case Appendix*, vol. II, p. 135.) He says :

We get more females than males. I think there may be 80 per cent of the seals on the coast females; I think that perhaps of the cows 75 per cent carry pups, and in Behring Sea the same percentage would apply to cows in milk, though I did not pay particular attention to the matter. We get plenty of barren cows... I have seen seals taken in milk 100 miles from the rookeries.

The next is the testimony of **Michael White**, of San Francisco, sealing captain.

(*Case of the U. S., Appendix*, vol. II, p. 489.)

He is a man who has had large experience. He details it but to save time, I will not read it. I go to the bottom of the page :

In 1887 I was master of the schooner *Lottie Fairfield*, sailing from San Francisco on or about the 17th day of March, and worked northward to the Behring Sea, and captured 883 seals. I then entered the Behring Sea about the 6th of July, cruising there until the 29th day of August, and took 2,517 seals more, the whole catch being 3,400 for the year.

Now I skip a few lines and read :

In my captures off the coast between here and Sitka 90 per cent of my catch were females, but off the coast of Unimack Pass there was a somewhat smaller percentage of females, and nearly all the females were cows heavy with pup, and, in some instances, the period of gestation was so near at hand that I have frequently taken the live pup from the mother's womb...

I never paid any particular attention to the exact number of (or proportion of each sex killed in the Behring Sea, but I do know that the larger portion of them were females, and were mothers giving milk. I have never hunted within 15 miles of the Pribiloff Islands; but I have often killed seals in milk at distances of not less than 100 to 200 miles from these islands. From my knowledge and experience in the business it is my conviction that within the last few years, since the sealers have become so numerous in the Pacific and Behring Sea, that not more than one out of three is secured. Our purpose and practice was to take all the seals we could get, regardless of their age or sex, without any discrimination whatever.

Now these few lines following ought to have been printed in different type, this is the conclusion :

The foregoing are samples of the many sworn declarations of men, having practical experience in, or knowledge of, pelagic sealing, which declarations, to the number of over 150, will be found at pp. 429 to 447 and 451 to 466 of the Appendix to the Argument of the United States.

Mr Justice Harlan. You say there, the Appendix to the Argument of the United States.

Mr Coudert. — Yes; that is what we sometimes call the “ Collated Testimony ”.

Now this High Tribunal has heard all the evidence which it is possible to furnish upon this subject — the evidence of Furriers, Sorters of Furs, Pelagic Sealers, Officers of the United States Government, Officers of the British Government, Canadian Officials, and they all concur upon this subject; and the most that can be said against the contention of the United States is, that when we insist that they are practically all female seals — that they run up to 85, 90, or as M. Grebnitzky says, 96 per cent — that we exaggerate; but it really is practically conceded, and possibly may be really in terms admitted, that the proportion is very large indeed, and that not less than 75 per cent are females.

As I said before and I repeat now, so far as our argument before this High Tribunal is concerned, it makes very little difference to us whether it is 75 per cent or 100 per cent, as some of these witnesses have said, who have the intelligence to understand that their business can be only temporary if this destruction proceeds. The whole stock has been rapidly depleted and exterminated. The fate of the southern seal which is not a matter that we need argue, is already darkening upon the horizon of the northern seal. There are no two rules and no two laws, one for the north and one for the south. The laws are just the same, and when you interfere with the laws of nature, the punishment is swift and certain.

It is inexorable. You may violate the laws of man and hope to escape through the errors of judges or the mistakes [and errors of juries. You may perhaps violate the commandments of God with the hope that He in His mercy will forgive you; but nature is inexorable; she goes with a lame foot sometimes, but always overtakes the man who perpetrates the wrong. She never fails and does not know how to fail.

Now with regard to catching seals and where they are generally caught in Behring Sea. This bears rather upon the question to which I called the attention of the Court a few days ago — the question of Regulations; and this High Tribunal may remember that I stated that I considered that any discussion was irrelevant on the question of Regulations, except in so far as the facts connected with the Pribiloff Islands and what was then there might have some bearing on the general facts of the Case. I think the High Tribunal is entitled to know all the facts in the Case, to know all about the seals, to know what is done in our islands, as well as what is done on the high seas; but as I stated then, any Regulation that is made is exclusive of our territory, because, by the very terms] of the Treaty, no Regulation affecting our jurisdiction or the jurisdiction of Great Britain can be promulgated.

A very few brief extracts further. Captain William Petit, Master of

the British Schooner “ Mischief ”, says this (and this is from the Report of the British Commissioners, page 224) :

Were you in Behring's Sea last year, and were you ordered out? — (A) Was ordered out by the United States' ship *Corwin*. (Q) Before being ordered out what was your usual fishing distance from land? — (A) 60 to 100 miles. (Q) You found seals all along that distance from land? — (A.) Yes, in large numbers.

And let me call attention again to this; I have done it before, and it may be wearisome to the Court, but it is a matter of very great importance when you come to consider the recommendations and advice of the British Commissioners when they recommend that there should be a zonal protection of 20 miles round the islands. They had the testimony before them of all these witnesses showing that there was no slaughter there and these men all kept outside; and when I said to the Court (and I say now) their recommendations are plainly intended to protect pelagic sealing and not the seal, I am founded upon the rock of the evidence that they themselves quote.

Then

Captain William Cox, Master of the British schooner *Sapphire*.

Q. What has been the general distance you have sealed — the distance from the seal islands? — A. From 100 to 140 miles. I was within 80 miles of them last year; that was nearest I was to them.

Q. Your principal ground for sealing you found where? — A. About 100 miles westward of the Islands of St. George and St. Paul. I took 4,000 in four days there.

Then

Captain W. E. Baker, Master of the British schooner *C. H. Tupper*; this is also from the *Report of British Commissioners*, page 224.

Q. While in Behring's Sea last year, what would be your usual sealing distance from the land? — A. I was not in Behring's Sea last year, but in previous years it would be from about 30 to 90 miles from land. The usual distance is about 68 miles. Sometimes we are inside of that, sometimes outside of it.

Now Andrew Laing has testified. I do not quote it. It will be found at page 232.

In the *British Case, Appendix*, vol. III, (*U. S.* No. 2,1890), p. 143, we find a Report of a Committee of the Privy Council for Canada, stating the positions of six of the sealing schooners which were seized in 1887. They are as follows :

1. The *W. P. SAYWARD*, July 9, at 58 miles from nearest land.
2. The *GRACE*, July 17, at 92 miles from nearest land.
3. The *ANNA BECK*, July 2, at 66 miles from nearest land.
4. The *DOLPHIN*, July 12, at 42 miles from nearest land.
5. The *ALFRED ADAMS*, August 6, at 62 miles from nearest land.
6. The *ADA*, August 25, about 15 miles northward from Ounalaska Island.

The foregoing declarations, and Report corroborate the statements of numerous witnesses cited by the United States to show that the best pelagic catches are often made at great distances from the Pribilof Island.

Mr Carter. — These were all in Behring Sea?

Mr Coudert. — Yes. I will now ask Mr Lansing to point out Unalaska Island.

[Mr Lansing then did so].

Mr Phelps. — That is, 150 miles from the Pribilof Islands.

Mr Coudert. — Directly in the course of migration. As I have said before, Captain William Cox was 100 miles to the west.

The President of the Tribunal will remember that some question was raised the other day, and Captain Cox is the gentleman who took, 1,000 in 4 days, and this testimony, the learned Tribunal will observe, seals also corroborates the charges that we read the other day, and before dismissing the subject I will call attention to this fact, that nowhere does any one witness, of all this number, whose depositions I have read, or in either case I think, say that seals were caught more than 200 miles to the West of the islands. When you consider that the Commander Islands are 800 miles off, you will notice that all these are in the zone of the Pribilof Islands, and are in that particular group.

Mr Justice Harlan. — The Commander Islands are 800 miles to the West, you say.

Mr Coudert. — Yes.

Sir Charles Russell. — I did not know that.

Mr Coudert. — Very nearly, in round figures, 800 miles.

Now with regard to the question of dead pups the learned Tribunal will find that considerable space is devoted to the examination of that question, and the origin of their death. Of course these animals will die, as all animals will, and a certain portion of them would perish under the best circumstances, but when there is a large loss, and that loss is coincident with the death of the mother, I do not think that we need to go into any careful examination or balancing of testimony. If we find a man with a bullet through his brain lying on the ground, even in the hot sun of July, we assume that he was killed by that bullet, and not by the sunstroke, and so when we find, at a certain period of the year, that a large number of pups die on the islands, that they are emaciated, and when they are opened there is nothing in their stomachs, or nothing but a very little milk; and you are shown at the same time that the mothers upon which they depend for sustenance have been killed — unless something can be shown that *prima facie* appears to account for the death outside these natural causes, we must assume that they die of starvation, and that is what the testimony undoubtedly shows.

Therefore, I will not dwell upon that. I prefer to let that matter stand as it is, and hear what arguments our friends on the other side may have to state on that subject. We simply say, the natural cause of death is the death of the mother, and if it were true, as it is not, that a mother would suckle more than her own, and would take a waif when she found it, from maternal instinct and charity, then the difficulty would be only slightly minimized, because the supply of food would not be sufficient to go around and take charge of all the young.

Now I will interrupt the regular course of my argument to answer a question of the learned President of the Tribunal with regard to the action of Russia in seizing pelagic sealers. In the Case and Counter Case of the United States and Appendix on pages 201, 202, 203 and 204 is all the information that we have upon the subject. It is imperfect; it is by no means as full as the Tribunal would like to have; but the learned Arbitrators will understand that that is not a subject upon which we can have any official evidence, and we must let the evidence such as has appeared in the Case speak for itself.

On the first page I have pointed out, N° 201, there is an extract from the *Victoria News* of August 31st, 1891. It is rather hysterical in its general tone and perhaps I ought not to read it in a solemn judicial proceeding. It talks about “ Russian Piracy ”, “ Startling Story ”, and it loses a good deal probably by being published as an extract and also by having large capital letters to emphasize the wrong committed by Russia; I will pass that and take the next page 202.

The *London Standard* of September the 10th states the fact in more moderate language :

The Minister of Marine is preparing a case to submit to the British Government relative to the seizure of Canadian Sealers by the Russian cruisers off Copper Island. The says the seizures were made not in Behring-Sea but in the North Pacific, and that they are most glaring violations of the treaty between Russia and Great Britain in 1888.

That is a misprint there. It is not 1888. It is probably 1858 ou 1859.

Mr Justice Harlan. There was a treaty in 1858.

Mr Coudert. — Then it is probably 1858. Then we have an extract from the *London Financial Times* of September 15, 1892, five days after this. It is written from Victoria, British Columbia, on the 13th September but it is published in the London paper on the 15th :

A comparison of the statements made by the captain of the Russian cruiser which seized a number of Canadian sealers in the Northern Pacific and the regular charts prepared by the agents of the marine department shows that the Schooner *Willie Mc Gowan* was 42 1/2 miles from the nearest land when seized. The *Rosie Olsen* also appears to have been 38 miles and the *Ariel* 30 miles out at sea. The sealer *Agnes Macdonald* arrived here to-day and reports that when 20 or 30 miles from Copper Island she put out her boats, which were, however, soon driven in by the Russians. The *Vancouver Belle* and other vessels have been seized all they contained being confiscated. The Russians are said to have declared that they would seize the British schooners wherever they found them, no matter what distance from the shore. The sealer *Libbie* will probably make a trip to the southern Pacific.

Then we have in the next page a letter from Collector Milne of Victoria to the Canadian Minister of Marine and Fisheries. This is written in the same year October 8th, 1892, and published in the *London Times* of November 11th, 1892.

Mr Justice Harlan. — That is a letter to the Collector.

Mr Coudert. — “ From the Collector ” it is headed on the top of the

page, but I think that it must be an error, and I think it is to the Collector.

Sir, As requested by you, we have measured the distance on the chart of Behring Sea, as given by you showing the exact places where the three British Schooners were seized by the Russian cruiser *Zabiaka* and the Russian Fur Company's steamer *Kotik*. Schooner *Willie Mc Govan*, latitude 50°, 50' N., longitude 167°, 50' E., a distance of 42 1/2 miles from Copper Island the nearest land.

Schooner *Rosie Olsen*, latitude 34°, 24' N.; longitude 163°, 40' E., a distance of 38 miles from Behring Island the nearest land.

Schooner *Ariel*, latitude 54°, 10' N. longitude 167°, 40' E., a distance of 30 miles from Copper Island, the nearest land.

Yours respectfully.

Then finally, and that is all I have to read on the subject, it may be interesting to the Tribunal to have me read a paragraph from page 204 on this subject.

The said latitude 54° 18' north, longitude 167° 12' east, is, by correct, observation measured by me, on the United States Coast Survey Chart, N° 900, more than 50 miles from Copper or Behring Islands on the high seas, and not in Russian waters; when at said time, and in the latitude and longitude above mentioned, on the 15 th day of July, A. D. 1892, as aforesaid, and not being at the time hunting or fishing, and not having at any time fished or hunted seals in Russian waters, but being at said time on my course for the Kurile Islands, as aforesaid, the said schooner was boarded by an officer from the Russian war cruiser *Zabiaka*, which said war cruiser *Zabiaka* was at all times herein mentioned, a regularly commissioned war cruiser belonging to the Russian Government, armed for offensive and defensive warfare, and acting under the authority and by the directions of the said Russian Government: and I was by said Russian officer ordered to come on board of said cruiser with all the schooner's papers; I accordingly went on board, and the captain of said cruiser, after examining the schooner's papers, arrested me, and then had all the crew of said schooner, except the mate, brought on board of said cruiser, and I and the crew of the schooner were kept on said cruiser as prisoners. The said Russian cruiser then and there seized said schooner *C. H. White*, and towed it to Michelovsky Bay, Behring Island, and then placed said schooner under prize crew and sent it to Petropaulovsky, and the cruiser, with me and the crew of said schooner as prisoners, sailed to Petropaulovsky and arrived there on the 20 th day of July, A. D. 1892; and while on board the said cruiser, I was by the Captain of said cruiser forced to sign a paper in Russian, which I did not understand, the said Captain threatening to send me to Siberia unless I signed said paper, and I only signed said paper under protest in consequence of said threat and the duress exercised by said Captain of said cruiser.

The Russian Government seized said schooner *C. H. White*, as hereinbefore set forth, but I do not know what disposition was made of said schooner, but I am advised and believe and therefore allege, that said schooner was repainted and refitted and used by said Russian Government, and is now in its possession, and by it used.

That is all the testimony that we have on this subject.

The President. — There was a protest of the captain.

Mr Coudert. — A deposition in which he filed a claim against the Russian Government in consequence of this seizure.

The President. — What is the consequence of this?

Mr Coudert. — So far as we know the Russian Government is using this ship yet.

The President. — And your Government said nothing about it.

Mr Coudert. — No action, as far as we know, was taken.

The President. — Do you suppose, as Counsel for the United States, that the Russian Government was acting in accordance with your principles.

Mr Coudert. — That is only fair to assume. In the first place there is a good deal of similarity between the actions of the two Governments in the two seizures, and our Government would have taken action certainly if it had not considered that the action was proper and in accordance with its own view of right.

Sir Charles Russell. — The conclusion of that is the protest of the captain.

Mr Coudert. — Yes, it is filed in the State Department.

Sir Charles Russell. — It says he duly noted the protest.

Mr Coudert. — What is the point? Do you wish me to read anything more? I will if you desire it.

Sir Charles Russell. — No.

Mr Justice Harlan. — It is a regular marine protest.

Mr Coudert. — Now there is one point to which I call the attention of the High Tribunal and that is the number of seals lost by wounding, or by killing and losing. In connection with that I would briefly refer to the British Commissioners' Report as giving the view most favourable to the Government of her Majesty, section 604.

Seals thus met with upon the sea surface are roughly classed by the hunters as sleepers and "travellers" and the former are of course, the most easily approached. Whether in canoes or boats, paddles are employed in preference to oars as they enable a more noiseless approach to the seals. When a seal is seen, the boat or canoe is quietly but swiftly impelled toward it till the hunter believes that he has arrived within sure range when he fires.

If killed, as happens in the majority of cases, especially now that the shot-gun has superseded the rifle, the seal may either remain floating upon the surface, or begin to sink slowly. In either case, the boat or canoe is at once urged forward, and if the carcase which does not differ much in specific gravity from the water, is already partly submerged, it is at once secured with a 15 foot gaff, and hauled on board. If the seal should happen to be merely badly wounded, it either struggles upon the surface until gaffed, or, if retaining strength to do so, dives. If quite lightly wounded, as of course happens in some cases, it may eventually escape; but if severely wounded it is probably killed at the next rise after a short submersion.

These are some of the chances that an animal has for its life.

We are informed that it has been learned by experience that seals may easily be lost if shot in the neck, as in this case the muscular contraction of the body often forces most of the air from the lungs, and the carcase then may sink much more rapidly than usual.

Now, how often these animals may be shot in the neck is apparent when you consider that the head is the part which is most exposed in many cases, so that you have all these chances of escape for the seals. In the first place he may escape as a carcase, dead, and go to the bottom,

when he does no good to anybody, or he may be badly wounded, or sufficiently wounded, simply, to escape.

Now, that there are some lost in this way, of course is admitted. How many, is the question? As I have said, 50 or 60 per cent is the proportion stated by us of those lost. The British Commissioners produce authority to show the number is much smaller; but when the Members of this High Court read the testimony, they will find that the pelagic sealers, when they talk of losing the seals that they shot, as a general rule, and almost in every case only speak of the seals that they kill; that is to say, they shoot a seal and they lose it, and they call that a loss; but they say when they wound them slightly, — well, they get well, — no doubt, they get well. I do not think we are bound to accept their theory; but, no doubt, some do get well because they are found with shot in their skins on the Pribiloff Islands. But the gravity of the wound is a matter as to which their opinion is absolutely worthless. It is enough to say that many of them are wounded, and some of them must naturally die.

Now Judge J. G. Swan of Port Townsend, Washington, is cited by the British Commissioners at section 623, he writes as follows :

I have seen several Makah Indians who have been here, and they tell me that Indians lose very few seals, whether they spear or shoot them, as they are always so near the seals such times that they can recover them before they sink. Captain Lavender, formerly of the schooner "Oscar and Hattie", who is a very fine shot, told me that he secured ninety-five seals out of every hundred that he shot.

Now here is a very fine shot, an exceptional shot, who gets 95 out of those that he kills, not that he shoots at. You will find that running all the way through. He says that "poor hunters, of which he had several on his vessel" — of course he had; he was bound by the laws to have them :

Would fire away a deal of ammunition and not hit anything, but would be sure to report on their return to the vessel that they had killed a seal each time they fired, but that all the seals sank except the few they brought on board. Captain Lavender was of opinion that not over 7 per cent of seals killed were lost.

How many of the seals wounded were lost is a question as to which he gives us no opinion.

On a consultation with the members of the Sealers Association of Victoria, comprising owners of sealing vessels and sealing captains, they called special attention and invited inquiry into the matter of the number lost. They explained that when the seals sink after being killed, as they often do, they sink slowly on a slant, so that it is usually quite easy to gaff them. They further affirmed that the result of the sealing in 1891 was, like that in former years, to show that the loss from this cause averaged below 6 per cent.

That is not being able to recover with the gaff those that were slanting off after being killed.

The captain of the "Eliza Edwards", interviewed at Vancouver, stated, as the result of his experience, that sealing must be learnt like any other business. That green hands might lose as much as 5 per cent of the seals shot. With experienced hunters the loss is very small. It might possibly amount to 3 per cent.

And in every one of those ships the men were green hands and this 25 per cent is not 25 0/0 of total loss including the wounded but only 25 0/0 of those they actually shot, but then they are at a distance of 30 or 40 yards off and by the time they get up particularly, if the seal shot in the neck, it sinks and cannot be recovered.

I have here the extract from the agreement of the Sealers Association which I read the other day. It requires that all hunters in excess of three shall be new men in the business of seal hunting. In each boat there are six or seven men; so that half the men are these very green hands who fail to recover one quarter of the seals that they kill. We have the testimony of this journalist Mr Mc Manus who said they would go out and blaze away all day and come back with nothing at all, and say they had killed them but lost them, and that the powder was bad, or the boat was clumsy. There is no reason to suppose that the testimony of this gentleman was not true, and there is no reason to suppose that there were worse shots on his boat than on any other.

I will read some very brief extracts. I will not trouble the court to look at the volumes, but will give it to my friends on the other side as I go along. It is so very brief that the court would be troubled to very little purpose. I am about reading from the Case of the United States, App, Vol. II, p. 313. This is what Peter Andersen of Victoria, a sealer, says :

I have been engaged in the last three years in taking seal in the North Pacific Ocean and Behring Sea in capacity of boat-steerer. The vessels I was employed on are as follows: *Black Diamond*, *Ariel*, and *Umbrina*, all British schooners. First saw and took seal off Cape Flattery in March and we followed them clear up the coast into Behring Sea, where we arrived about July 1st. Shot gun and rifle exclusively in the boats I was in, thence I am satisfied that 33 1/3 per cent shot with a shot gun are lost, and when a rifle is used a larger per cent are lost when killed.

That is more than half where a rifle is used. That is in perfect accord with the British Commissioners who say that the shot gun is much more deadly. They recommend superseding the rifle with the shot gun.

Bernard Blaidner, of Victoria, a sealer, says :

On an average we saved one out of three that were killed.

I want to call the attention of the court to that language used in almost every one of the depositions. I admit that at first I was misled and did not see the point of the distinction. There are two ways, one killing the animal and losing him so that you cannot recover him at any time, and the other wounding him and allowing him to escape.

Mr Christ Clausen, of Victoria, master mariner, says :

The Indian hunters, when they used spears saved nearly every one they struck. It is my observation and experience that an Indian, or a white hunter unless very expert, will kill and destroy many times more than he will save, if he uses firearms. It is our object to take them when asleep on the water, and any attempt to capture a breeching seal, generally ends in failure.

Alfred Dardean of Victoria, sealer, was out sealing in 1890 and caught 2459 skins. He says :

We had seven boats, and a stern boat and three men to a boat. Our hunters used shot guns, and were good hunters. They lost a good many seals, but I do not know what proportion was lost to those killed. Some of the hunters would lose four out of every six killed. We tried to shoot them while asleep, but shot all that came in our way. If we killed them too dead a great many would sink before we could get them and were lost. Sometimes we could get some of these that had sunk with the gaff hook, but could not save many that way. A good many are wounded and escape only to die afterwards.

Hunters talk about the seals increasing from year to year, but I know they are decreasing, and if they keep on killing them the way they do now there will not be any left in a few years.

James Hayward of Victoria, a sealer has had large experience. Was out in 1887, 1888, 1890. He says :

I do not think we got over one half that we killed and wounded. Have seen six out of seven killed sink and were lost before we could get to them. This happened last year in a boat I was in. I think the seals are not near as plenty as a few years ago, and they are much more shy and harder to catch now than they were when I first went out sealing. I think this is caused by hunting them so much with guns.

J. Johnson of Victoria. He was out six years of his life sealing. He says :

About 40 per cent shot with a shot gun are lost. When a rifle is used a larger per cent is lost.

Morris Moss. Furrier, and Vice-President of the Sealers Association of Victoria, says — this is opinion, and will go for what it is worth. He says :

I cannot say how many seals are killed and wounded but there is no doubt that green hunters lose many while those more experienced in the business lose fewer.

There is no doubt about that, and it is conceded by the British Commissioners.

What Mr McManus says I have already read. He is the journalist whose diary I have already given to the Court.

Mr King Hall, who is a subject of Her Majesty, a correspondent of the *New York Herald*, was on the *Otto* at the same time. He says :

I am convinced that at the very least our hunters lose 50 per cent of the seals they hit, and probably the majority of those hit ultimately die.

Mr Daniel Mc Lean whom I have cited before, and who is spoken of as a successful sealer by the Canadian inspector of fisheries is quoted. He is asked the question :

According to your experience what percentage of animals that are shot at, are actually taken by the boats? A. That is according to the amount of ammunition we use. About one third are taken.

Charles Peterson says he went out sealing 1886, 1887, 1889, 1890 and 1891. Seals were caught by them (Indians) with spears and but few were lost; but since the shot gun has come into use a great many are destroyed and lost.

Henry Moxon of London, Furrier, gives his opinion from common report :

Have you not heard it alleged that pelagic sealing is a wasteful method because of the number of seals that are wounded and sink before they can be picked up? — A. I have heard that reported, but the result of my conversation with a large number of old sealers and experienced men in Victoria is quite contrary, and I am convinced that not more than one in seven is lost. Certainly a skilled hunter would not lose more.

This is the testimony of our friends on the other side, given by a gentleman who evidently meant to aid in minimizing the loss. He is convinced — that is as far, evidently as he can go — that not more than one in seven is lost.

Michael White of San Francisco, a sealing captain, says that not more than one out of three is secured.

It makes no difference whether that is actually correct. It may be five per cent or ten per cent. All we mean by this is, that superadded to the enormous loss by the killing of the males is the loss by killing and losing these females. We have the testimony of over 200 witnesses on this and the high court will find that further testimony, if it is required, at pages 469 to 510 of the Appendix to the Argument.

One single word more as to the management. The British Government have endeavored to show that too many male seals have been killed on the Pribilof Islands beginning with the year 1870, and that a gradual deterioration in the herd has been taking place. Even if this could be shown, it would form no justification for pelagic sealing and would therefore be considered irrelevant. Suppose it were true; suppose the United States had been reckless or had employed corrupt and bad agents, the principle is admitted to be good. The property — I will not say is conceded — but is proved to be theirs on the islands; and if pelagic sealing is destructive, the fact that we must do our sealing on the islands cannot be disputed. Suppose these seals were under the control of the United States as well as the islands. Would it make any difference, and would anybody say that we had less right to protect seals at sea because they were not treated well on the shore.

There is no evidence, however — and I shall not pursue the subject in my anxiety to close the argument to-day — to show that any bad results followed upon the killing of a hundred thousand male seals prior to the introduction of pelagic sealing; and that is the point upon which I insist and to which I must strenuously call the attention of the court — that there was no complaint, no loss, no difficulty, and that every thing went on prosperously and satisfactorily until the enormous depreciation in the herd caused by pelagic sealing became manifest.

This point has been treated carefully in the Counter Case of the United States, and I will dismiss the subject by reading short extracts from it. I read from the Counter Case of the United States, page 65.

In establishing their assertion that the number of seals annually killed on the Islands was excessive, it is insisted by the United States that the Commissioners

should be confined to the first decade of the lease of the Pribilof Islands to the Alaska Commercial Company (1874-1880), because pelagic sealing was then too insignificant to perceptibly affect seal life, and that any consideration of the management subsequent to the introduction of pelagic sealing, which is admitted to be a factor "tending towards decrease" (Sec. 60), is irrelevant to the question at issue, unless it can be shown that there was a sufficient increase in the number of seals killed on the Islands, or sufficient changes in the methods employed in taking the quota, to materially affect and deplete the seal herd, even without the introduction of pelagic sealing.

There is no pretence of that. There is no pretence anywhere that if it had not been for the introduction of pelagic sealing there would have been such a decrease on the islands as to imperil the existence of the herd. The British Commissioners themselves do not pretend that.

On page 67 :

The United States, however, insist that the failure, if any, to take into account the "new factor" (viz, pelagic sealing) is wholly irrelevant to the true issue, and they have presented testimony in relation to the management on the Islands for the purpose of showing, and which shows, that such management could not, under normal conditions, have caused a decrease in the Pribilof seal herd.

The report fails to establish — and we assert this with great confidence — a single instance, where the management on the Islands or the methods employed thereon have been changed since 1880 from the "appropriate and even perfect" system adopted in 1870, or where the number of seals killed annually has been increased beyond the annual quota of the first ten years of the lease.

I will read a few lines more and then submit this part of the case to the court. I read from page 69 :

The alleged excessive killing of male seals must rest entirely on the proposition, which the Report endeavours to establish, that, by means of this license to slaughter 100,000 young males on the Islands, the breeding males have become so depleted as to be unable to fertilize the females, thus creating a decrease in the birth rate sufficient to account for the present condition of the Alaskan seal herd. To establish this, the Commissioners refer, among other things, to the report to the Treasury Department in 1875 of Captain Charles Bryant. This official did, as stated in the Report (Sec. 678), advise the Secretary of the Treasury, in view of his observations, to reduce the number of the quota to 85,000 skins; but the true reason of this recommendation is obscured in the Report by a collection of quotations from various writings, of which he is the author, and by placing an erroneous interpretation on his language.

He is then cited to say this :

In the season of 1868, before the prohibitory law was passed and enforced, numerous parties sealed on the Islands at will and took about two hundred and fifty thousand seals. They killed mostly all the product of 1866-77. In making our calculations for breeding seals we did not take that loss into consideration, so that in 1872-73, when the crop of 1866-69 would have matured, we were a little short. These seals had been killed. For that reason, to render the matter doubly sure, I recommended to the Secretary a diminution of 15,000 seals for the ten years ensuing. I do not, however, wish to be understood as saying that the seals are all decreasing—that the proportionate number of male seals of the proper age to take is decreasing.

Q. The females are increasing?

A. Yes, sir ; and consequently the number of pups produced annually.

On page 73 :

The other class of statements or conclusions advanced, to show that the breeding and non-breeding seals decreased during the ten years following the leasing of the Pribilof Islands in 1879, may be divided into three heads, namely, an alleged increased proportion of females to breeding males, an alleged recognition by the lessees of the decrease of male seals, and alleged overdriving and resort to new areas to obtain the quota. The first allegation is based entirely on comparisons between the early years of the lease of 1870 and the last two or three years of the same (1889-1891). The United States insist that such comparisons are irrelevant, for, even if the breeding males were disproportionately few during the latter years, it is the result of a decreased birth rate caused by pelagic sealing.

And that the facts will show, and the irresistible inference from the facts that are uncontradicted must establish that proposition, that the births also had diminished from the pelagic sealing during those years under the circumstances stated heretofore.

As to the question of driving on page 78. The Tribunal will understand what is meant by driving. These animals are carefully selected. The young seals are driven up like sheep to a certain inclosure or a certain place where they are kept together. Then they are carefully selected. It is stated by the British Commissioners that the drives are too long and that they get exhausted.

The question of driving in 1879 from areas, before reserved and untouched, is used in the Report to show that the male seals had decreased to such an extent as to compel the resort to those hauling grounds. The Commissioners refer to this in the following words: " Whatever may have been the detailed history of the seal interests on St. Paul in the intervening years, the fact that in 1879 it became necessary for the first time to extend the area of driving, so as to include Zapadnie and Polavina rookeries, or the hauling grounds adjacent to them, shows conclusively that a great change for the worse had already occurred at that date.

That is, at that time they were obliged to take in a new area that they had not touched before.

This statement is not in accord with the facts. Prior to 1879 Polavina had been driven from, every year but two.

So that these gentlemen are mistaken as to the fact.

And Zapadnie had supplied its portion to the quota of skins every year of the lease prior to 1879, as is shown in the table cited.

It is insisted by the United States that driving and redriving after the introduction of pelagic sealing, if any occurred, was directly chargeable to the condition created by open sea sealing. We do not deny, and we have not denied that pelagic seal hunting introduced a new condition or factor into the business and that what was eminently proper and successful and led to the prosperity of the industry became impossible afterwards; that one hundred thousand were too many; and that the United States Government was obliged to restrict its killing because of the killing on high seas and the reduction of the birth-rate. They were no longer born as they were before. Taking 12, 13, 14, 15, 20 thousand female seals a year for

4, 5, 6, 7 or 8 years naturally caused an enormous decrease in the birth-rate so as to actually threaten and begin extermination.

Does any one undertake to justify pelagic sealing? Does any man but the British Commissioners themselves, with their new born zeal in favor of this industry, say that pelagic sealing is a good method and that killing on the islands is a bad method.

There are passages in their report in which they speak of this as the ideal system, the system of the United States. They say the system as commenced by Russia was an excellent system and that it was continued by the United States, and that it is practically the ideal system; but they say at section 76, and I will give you both their opinions, and the Arbitrators will choose and attribute to them in sincerity whichever they like.

It is thus clear that the killing of seals upon the breeding-islands is in itself an essentially critical and dangerous method of killing, which although established by long custom can scarcely be otherwise justified.

There is a plain statement that killing where you can discriminate is wrong.

I now read section 660 of these same gentlemen now giving their opinions :

Theoretically and apart from this question of number and other matters incidental to the actual working of the methods implied these were exceedingly proper —

That is our methods on the islands which they have just condemned —

These were exceedingly proper and well conceived to insure a large continual output of skins from the breeding islands, always under the supposition that the lessees of these islands could have no competitors in the North Pacific.

I do not ask to put it in stronger language. I ask for no better mode of expressing our view upon that subject, that these methods were theoretically exceedingly proper and well conceived, not only to keep the herd in good order but to secure a large continual annual output, “ always under the supposition that the lessees of these islands could have no competitors in the North Pacific. ”

That is to say, the system on the islands would be an admirable system, would continue to work in the future as it has worked in the past, provided pelagic sealing did not interfere. With that we will agree. We will admit that our system cannot co-exist with the pelagic system, and that you have to condemn the one or the other in your own judgment. There is no circumscribing it. There is no appellation for it. You cannot say you will do this for twenty miles or 30 or 40 or 50 miles beyond the islands. Either you must condemn or you must permit. To say that you are going to give us a zone of 20 miles or 50 miles, you might as well apply a bread and milk poultice to the bite of a rattle snake, to cure the man who is suffering. It has got to be scotched and killed, the whole business, or let alone.

There were a number of paragraphs which I had laid out but shall not

undertake to read. But there is a paragraph that I want to read because it may be seriously intended. Whether it is actually serious or is an exhibition of grim humour on the part of these gentlemen, I do not know.

After the Tribunal has heard it read, the Tribunal can decide.

It is an implied threat that if the United States do not behave themselves and so conduct the killing on land that pelagic sealing will be prosperous, the stream of these animals may be diverted to some other place by the ingenuity and skill of man, just as a water course is tapped and I get the water from your farm and put it upon mine. So these ingenious British Commissioners have threatened us, in covert and scientific and polite language with taking all the seals away and putting them on British territory; and all because the seals have such a keen sense of smell. It is section 524 of the British Commissioners report.

This is particularly worthy of consideration in the case of the Aleutian Islands, where, in consequence of the now very small and still decreasing number of natives, it would not be difficult to set apart reserves for this purpose, as well as for the propagation of the sea-otter. The greatest difficulty in the case of the fur-seal would doubtless be found in the matter of inducing the first colonization of such new rookery grounds.

To that I fully agree. *C'est le premier pas qui coûte*, as St. Dennis said when his head was taken off. So it would be, I undertake to say, if you can get the Prililoff herd to stop at a half way house and rest and refresh themselves there and be happy, the rest would be comparatively easy.

But as it has been shown that the smell of the formerly occupied rookeries is one of the chief — if not the chief — attraction to the first-arriving seals, and as this smell is inherent chiefly in the soil of these rookeries, it is perhaps not unworthy of consideration whether the transfer of portions of this seal-impregnated soil, and its scattering over suitable places — particularly such as lie near the migration-route of the seal — might not lead to their occupation. In any case, such reservations would soon be colonized by the more widely wandering sea-lions and hair-seals, and the security and increase of these, would probably after a time have the effect of producing a sense of safety which might induce the fur-seal to take up its abode there at the breeding season. The principal objection to experiments of this kind would be the cost of affording the necessary protection, but if such islands were also stocked with and preserved for the blue-fox, the sale of the skins of this animal might alone, in the course of a few years, be sufficient to cover a large part of this cost.

Similar measures would, of course, be also worthy of consideration in the case of various places on the shores of British Columbia, or on the Asiatic coasts of the Pacific.

Science has made such progress that I do not think, pursuing that, that it is necessary even to raid our island to get our soil. Of course the United States, if this be so, would not be willing to have ship loads of its soil transferred for the purpose of colonizing foreign countries with seals; but after all, chemistry can do almost anything, and I suppose that chemically this might be imitated, and the sense of smell, however acute, of these animals, might not detect the difference.

But whether this is meant seriously or not, I leave the court to deter-

mine. I confess I am very much puzzled about it. It is ingenious. Jules Verne might enjoy it very much, and write a book upon it. I am sure he might succeed in populating the islands to his entire satisfaction.

My time is so short that I shall call the attention of the Court in conclusion only to some of the opinions of the naturalists. On pages 411, 412, and following, of the Appendix to the Case of the United States are the letters of naturalists. First, we have a statement by Professor Huxley.

Sir Charles Russell. — Will you read the paragraph before that?

Mr Coudert. — I would read it with great pleasure if I did not intend to close the argument this evening. I will leave it to you to read.

Here is what our friends on the other side say that

Professor Huxley says.

(Counter Case of Her Britannic Majesty's Government, p. 183):

In his statement, printed in the Appendix to the United States' Case, Professor Huxley, on the subject of the possibility of destroying the seals when on their breeding-islands, writes : —

In the case of the fur-seal fisheries, the destructive agency of man is prepotent on the Pribiloff Islands. It is obvious that the seals might be destroyed and driven away completely in two or three seasons.

That is a part, and a very small part, of what he says; and on page 412 you will find a complete statement, which our friends did not take down :

Might be destroyed and driven away completely in two or three seasons. Moreover, as the number of "Bachelors" in any given season is easily ascertained, it is possible to keep down the take to such a percentage as shall do no harm to the stock. The conditions for efficient regulation are here quite ideal.

That is the tribute that Professor Huxley pays to our system. "The conditions are quite ideal."

Sir Charles Russell. — He then goes on to say it is impracticable.

Mr Coudert. — That may be. I mean to say simply this : that the extract given in this Counter Case gives exactly the reverse of what this eminent gentleman says.

Mr Justice Harlan. — Read the sixth paragraph there in Professor Huxley's letter.

Mr Coudert. — Yes.

But in Behring Sea and on the Northwest coast the case is totally altered. In order to get rid of all complications, let it be supposed that western North America, from Behring Straits to California, is in the possession of one power, and that we have only to consider the question of the regulations which that power should make and enforce in order to preserve the fur-seal fisheries. Suppose, further, that the authority of that power extended over Behring Sea and over all the northwest Pacific east of a line drawn from the Shumagin Islands to California.

Under such conditions I should say (looking at nothing but the preservation of the seals) that the best course would be to prohibit the taking of the fur-seals anywhere except on the Pribilof Islands, and to limit the take to such percentage as experience proved to be consistent with the preservation of a good average stock.

The furs would be in the best order, the waste of life would be least, and, if the system were honestly worked there could be no danger of overfishing.

Sir Charles Russell. — Will you read No. 7. The Arbitrator has asked you to read No. 6.

Mr Coudert. — I will, out of deference to my learned friend on the other side :

However, since northwest America does not belong to one power, and since international law does not acknowledge Behring Sea to be a *mare clausum*, nor recognize the jurisdiction of a riverain power beyond the 3-mile limit, it is quite clear that this ideal arrangement is impracticable.

The Case of the fur-seal fisheries is, in fact, even more difficult than that of the Salmon fisheries, in such a river as the Rhine where the upper waters belong to one power and the lower to another.

As I read Professor's Huxley's opinion as a naturalist, and not as a man versed in international law, I do not think that makes any difference. I am satisfied he can suggest no better system, and according to him, if honestly administered, it is an ideal system on the land.

Dr Selater says :

1. Unless proper measures are taken to restrict the indiscriminate capture of the fur-seal in the North Pacific, he is of opinion that the extermination of this species will take place in a few years, as it has already done in the case of other species of the same group in other parts of the world.

2. It seems to him that the proper way of proceeding would be to stop the killing of females and young of the fur-seal altogether or as far as possible, and to restrict the killing of the males to a certain number in each year.

3. The only way he can imagine by which these rules could be carried out is by killing the seals only in the islands at the breeding time (at which time it appears that the young males keep apart from the females and old males), and by preventing altogether, as far as possible, the destruction of the fur-seals at all other times and in other places.

Following this is a circular letter of Dr. C. Hart Merriam. He was one of the American Commissioners. After having commented as I have upon the testimony of the British Commissioners, I desire to beg this High Tribunal to read the reports of our American Commissioners. I am very much mistaken if they will not find an entirely different tone and temper from that which is found in that of the British Commissioners.

Dr. Merriam's letter is too long to be read. He elicited from some of the most eminent scientists in the world their opinions, and I will not read those. It will take too long. They are gentlemen eminent in France, in England, in Germany, in Sweden, in Italy. There is one letter especially, the longest of all, which I had intended to read, but shall not—that of Professor Giglioli. It is an extremely interesting letter. I can say that, almost without an exception, these gentlemen are of opinion that if the fur-seal is to be protected, it must be protected by prohibiting pelagic sealing, and having the killing done on land. They all say that it must be limited even on land, which of course is precisely what we do. I cannot do justice to this letter of Professor Giglioli if I read it in part.

I will ask the Court, as I am anxious to close this argument, that is already too long — I will ask them to read these letters of these gentlemen. They are valuable contributions to science. They are valuable contributions to our case. They are valuable contributions and additions to the knowledge which we have endeavored to bring here before the Court.

With this, so far as the merits of this case are concerned, I am ready and willing to submit the case of the United States. I stated to the Court that I would endeavor to show, and I believe that we have shown, that the system of killing on land is the only one that can preserve this threatened race of animals; that it is now being rapidly exterminated; that the brutality and crime of it alone, ought to stamp it and to prevent its being carried on, even without the serious results that threaten a valuable industry. You will see that there is no way of dealing with this except to stop it; that it cannot be dealt with otherwise, for this simple reason, this radical reason, this reason that goes to the very root and heart of the whole system — that is, inability to discriminate. If among the plans suggested — if any plans are suggested — anyone would say: “ You could discriminate in such a way that it would be worth considering ”, it might be different; but whatever plans are brought before this Tribunal are only suggestions as to zones and only suggestions as to time; and when you are told by intelligent men advocating the other side that the pelagic sealer can no more be expected to discriminate as to the sex of the animals that he takes than the fisherman with his hook, the seal of condemnation is put upon this. The judgment of the Court must follow upon those facts. How can it be otherwise? What knowledge is there produced before you that shows you that it is anything else than what Mr Phelps called *contra bonos mores*, and absolutely destructive? How long will this last? Suppose this should not be decided by you. Suppose it had not been submitted to you, and in its anxiety to remove all causes of offence with a friendly nation, the United States Government had said: “ We will go on ”.

The United States can afford rather to lose this valuable industry than to come into collision with a friendly power; the cause of civilization would suffer less than if these two great nations, among those that lead in the world, those that are giving the example of this thing that was begun at Geneva and is going on now at Paris, had come into collision. If she had said, “ We will let it go on ” how long would this have lasted. There was a temporary interregnum on the islands one year, and 250,000 of these animals were swept out; and yet these pelagic sealers had scarcely tasted blood, and hardly knew what the conditions were. That is growing every day. The small fleet of three ships has grown to 122. Even now when I am talking to you, do you not suppose this is going on; gravid females are being slaughtered on the way up to their homes on the Pribiloff Islands? Do you not understand that this *Modus Vivendi* was simply accepted for a while for the sake of peace, and because we could do

no better? The matter is now in the hands of this Tribunal, and to its hands I commit it, hopeful, and I will say confident, that the result will be a step in advance in the cause of humanity and fair dealing among nations.

One single word now as to the question of damages. I do not propose to discuss that. My learned friend, Judge Blodgett, had prepared a careful brief. As I understand the Treaty, this Tribunal has no power to pass upon the liability of either nation as against the other. There was some discussion as to that, and Great Britain was unwilling that question should be submitted to this high Court of Arbitration. We had our claims, you had your claims, and we were willing both should be submitted.

Sir Charles Russell. — It was the other way, I think.

Mr Coudert. — The other way, if you please. I think not. But the nations were not willing, and they did not submit this question of liability, leaving this Court to find upon the questions of fact. Now, we are divided upon a question of law, and yet to some extent it may control the Court in finding upon the facts. That is, as to intricate and remote damages. We submit to the Court — it is well settled by the law of Great Britain as by the law of the United States, that the prospective catch of a ship is too remote; that you cannot count upon that as a clear result, where there has been no malice especially. If it were the case of a malicious taking, where individuals were concerned, then you might say the law will be effectual, and the judgment will not only give judgment, but inflict chastisement upon the wrong-doer; but I take it to be well settled law, law settled not only in the national municipal tribunals of these two countries, but settled on a precisely similar principle in the great arbitration at Geneva; and there it was settled by all the judges, all concurring in that result, and all establishing that precedent.

There is also a new element of damages asserted here, that of the Sayward Case. That we object to *in toto*, because it is not in the bill of particulars, and this Court has no power now to examine new matters brought up, and of it we were not notified in season.

It is in the Counter Case. But even if it were I should say upon its face that claim cannot be sustained. The learned counsel for Great Britain selected its own Tribunal. It went before the Supreme Court of the United States to ask for relief, and it failed to get it. It is estopped, therefore, from denying that that was a just decision. Is there any precedent for holding that a defeated party, after having been defeated in the Tribunal of his own choice, can call upon the other party to pay all its expenses for the preparation and argument of the case. I submit there is no such precedent, and that that must be at once dismissed, and that it should be found as a fact that the parties having gone to this Court, the Supreme Court of the United States, of its own option and volition, it cannot now make any claim upon the United States.

The claim for the money paid to British schooners is, I think, after the submission. At all events, it is only in the Counter Case, and it has come too late.

I have nothing now to do in addition, but to thank the Court for its kind and courteous and patient attention.

The President. Mr. Coudert, you have captivated our attention by a remarkable display of talent, and we have to thank you for the great ability, liveliness, and I may say, humour, with which you have carried us over this otherwise rather dreary field of questions of fact.

As a Frenchman, allow me to add, I have been happy to notice and to see shine out in your manner some of the best characteristics of the French nation,

Mr Phelps. — Before the Tribunal adjourns, and before the argument on the other side commences, I wish to say for the benefit of the counsel on the other side, that in the concluding argument, I shall rely upon all the authorities that will be found referred to in the printed argument of the United States between pages 130 and 190, and upon all the points that are made in that part of the argument. Many of these authorities have not been referred to, and it might possibly be supposed that we were not intending to depend upon them in the concluding argument.

The President. — We will certainly take heed of your remark.

The Tribunal thereupon adjourned to Wednesday, May 10, 1893, at 11,30 o'clock A. M.

Berlin 22.11.1893

HOTEL DU MINISTÈRE DES AFFAIRES ÉTRANGÈRES, PARIS

COMPTE RENDU DES SÉANCES
DU
TRIBUNAL D'ARBITRAGE
SIÉGEANT A PARIS, 1893

V^E PARTIE

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REPORT OF THE PROCEEDINGS
OF THE
TRIBUNAL OF ARBITRATION
CONVENED AT PARIS, 1893

PART V

10TH - 31ST MAY

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ARGUMENT

OF

SIR CHARLES RUSSELL, Q. C., M. P.

HER BRITANNIC MAJESTY'S ATTORNEY GENERAL

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TWENTIETH DAY. MAY 10TH, 1893.

The President. — Now we will hear the other side, and we are quite ready, Sir Charles Russell, to give you full attention.

Sir Charles Russell. — Mr President and Gentlemen, I do not propose, at this stage of the discussion, to trouble the Tribunal with any comments upon the importance of the fact of this Arbitration, — the fact that two great Powers have come by friendly agreement to submit to arbitration the differences existing between them. Nor do I intend, at this stage, to comment upon the far-reaching importance of the questions involved, nor upon the dignity of this Tribunal, which has taken upon itself the burden of dealing with those questions. I may have, at a later stage, something to say on each of these points; but I desire at once to go straight to the discussion of the subjects with which this Tribunal is charged.

Those subjects naturally divide themselves under four heads. There is, first, that group of questions which we have agreed to call questions of exclusive jurisdiction and right, embraced in the five questions of Article VI of the Treaty of Arbitration. That is the first division. There is, next, the question of Regulations, should the occasion therefor arise, contemplated by Article VII of the Treaty of Arbitration. There is, next, the claim for damages, which, so far as the case of the Government of the Queen is concerned, relates to the seizures unwarrantably made, as that Government contends, and which is dealt with by Article VIII of the Treaty of Arbitration. And, lastly, there is the claim for damages under the 5th Article of the *Modus Vivendi* of 1892.

My learned friends in their discussion have dealt in a greater or a less degree with all of these questions. The Tribunal does not require to be again told by me the position which the Counsel for Great Britain have assumed in relation to these questions; nor to be told that, upon the present occasion, I do not intend to discuss at all the question of Regulations. They belong to a different category. They involve different considerations; and, as it seems to us, they cannot with advantage or with clearness be approached until you have first determined the question whether the consideration of Regulations is to be approached in view of the existence of a legal right of an exclusive character upon the part of America, or in view of the fact, for which we contend, that the United States have no exclusive right of any kind in fur-seals, or in relation to the protection of fur-seals, or in an industry founded on fur-seals; that they have in fact no legal right of that nature at all. Therefore it is

that we propose to reserve until a later occasion all discussion as to the question of Regulations.

Nor need I stop to remind the Tribunal of the position which has been consistently and persistently maintained by the Government of the Queen in relation to these two sets of questions : rights and regulations. Our position from the first has been, and is now, an absolute and complete denial of any exclusive right of property, jurisdiction, or protection ; but, while that is our position, we have from the first expressed our desire to approach the consideration of the question of Regulations in a fair, just, and equitable spirit, to approach it upon the basis that this question of fur-sealing is one in which there is a common interest of mankind, and which is not the exclusive appurtenance of any one Power.

Now, Mr President, my learned friends, the learned Counsel for the United States, have occupied some twelve days in presenting their views to this Tribunal : not an hour too long in view of the importance of the questions, if it shall be found, upon consideration and examination of their argument, that that time has been devoted to topics relevant and apposite to the questions with which you have to deal. Upon that subject I must have a good deal to say ; but I may be permitted for myself, and for my learned colleagues, to join in the congratulations of a complimentary kind expressed by the President upon the arguments of my learned friends. They were learned, they were erudite, they were full of what Mr Coudert well said in reference to the argument of his learned colleague who preceded him, but which I may with equal propriety also say of the argument of Mr Coudert himself, they were arguments full of " intellectual allurements ". " Allurements " is a good word. I shall have to submit to this Tribunal that a great many of those arguments were remote indeed from any of the legal questions which you have to decide : that they have taken us very far afield : that, in this 19th Century of Christian civilization, after the world has existed I know not how many years, it is astounding that it should be thought necessary to dig, as my learned friend Mr Carter did, down to the foundations of human society in order to try and discover those upon which the institution of property rest.

Nor can I think that at this stage of the world's existence, when we are discussing, as is admitted, questions of law, — questions of right to be determined according to law, — a Tribunal such as this can derive much assistance from courageous ascents into the mists and clouds of metaphysical and ethical discussion such as my learned friend has made. The world has lived very long ; society has, through all the ages, been struggling to evolve rules for itself, for its security, for its good order, for peace among men : rules which have been found to suit the convenience of society, which have been found to be conducive to the good order of society, and which have found authoritative expression in the tribunals of all civilized countries.

We cannot but think (we are of course taking the advocate's view of the question) that, in truth, my learned friends have been but making.

a gallant defence of positions which, in point of law, are utterly indefensible.

Now I may assume, I think, that this Tribunal has made itself conversant with a large part, at least, of that mass of literature with which each side has burdened the Tribunal; and I think, if I am well founded in that belief, that the Arbitrators cannot fail to have marked the change of front in some very important points which has taken place on the part of those who are representing the interests of the United States. This change of front appears when you contrast their arguments to-day with the position taken up in the diplomatic correspondence which preceded this Arbitration, and in the proceedings which were instituted at the instance of the Government of the United States in its own municipal Courts.

I will only, in passing, indicate generally some of those leading changes. I do not refer to them merely for the sake of pointing out a certain inconsistency of conduct. It will be found that there is a real reason underlying that inconsistency, which I shall seek to develop and to bring to the notice of this Tribunal in the course of the discussion of the case. For the moment, I content myself with a general indication of some of the more remarkable changes of front.

Changes of front in
United States position.

The first is this. Although the first four questions of Article VI deal with the assertion of a claim derived from Russia, — a claim of exclusive jurisdiction and exclusive rights which it is asserted Russia exercised, and which it is further asserted passed unimpaired to the United States, — we are now told that this derivative title under Russia is a matter of practically no moment. Why? Because we are told that what Russia did needs not to be justified upon the basis of an exclusive jurisdiction, but amounted simply to such executive protective acts as any Power, apart altogether from exclusive jurisdiction, may rightfully exercise in defence of its property and interests. I shall, of course, have something to say about that in a moment: I will merely in passing call attention to the fact that it is impossible to explain the frame of those four questions consistently with any such idea of a mere inherent right of protection of property or of interest: and for this simple reason, that each of those questions is a question of exclusive jurisdiction in a defined area — namely in Behring Sea; and that if the acts of Russia had been acts of defence of property — a right which is inseparable from the possession of property — then that right would not be confined to a defined area, namely the eastern part of Behring Sea, but would be a right which would exist and follow the property wherever the property itself existed. That is the first change of front, a remarkable and a significant change, — all the more remarkable when the Tribunal bears in mind the Statutes of the United States, which I shall have to examine presently; the mode in which the aid of those Statutes; was invoked by the agents and representatives of the Executive of the United States; and lastly, the judgments

of the Courts upon those municipal Statutes, by virtue of which judgments, and by virtue of which judgments alone, they have secured the confiscation of and so affected the property in the vessels of British subjects.

The next change of front is not less remarkable. The third of those Questions in Article VI, the Arbitrators will remember, is the question, “ Was the [body of water, now known as Behring Sea, included in the phrase ‘Pacific Ocean’ as used in the Treaty of 1825? ” The importance of the question cannot be exaggerated; because, if it were true that, under the operation of the Treaty of 1825, Russia, the predecessor in title of the United States in the Alaskan territory, had recognised the general right of fishing in the North Pacific Ocean including the Behring Sea, of course it would go a long way to negative the existence of any right to limit the right of fishing to citizens of the United States, or to those authorised by the Executive of the United States. But to-day we are told by my friend Mr Carter, in his elaborate argument, that this also is a comparatively unimportant question. The question whether, by those Treaties of 1824 and 1825, Russia recognised the right of all the world to fish in Behring Sea has become comparatively unimportant! although the responsible Minister of the United States, after this matter had been under discussion diplomatically from August of 1886 till the end of 1890 — I am referring, as of course the Tribunal will recollect, to the despatch of the late Mr Blaine, — declared in his despatch of the 17th of December, 1890, that if Great Britain could satisfactorily establish that Behring Sea was included, in the Treaty of 1825, in the term “ Pacific Ocean ”, the United States had no well-founded cause of complaint against Great Britain.

It is odd that it should be so, but it is left to me, to some extent at least, to vindicate the intelligence and the perspicacity of that distinguished American statesman. He was putting forward a case, not a very hopeful one, certainly, but still a case infinitely more hopeful — if he could have established historically the acquiescence of Great Britain — infinitely more hopeful than the case which is now put forward of property, and right of protection of property, or of an industry founded upon property.

The last change of front is this. It is not, I will admit, as marked as the other two to which I have adverted. We are now told that although strictly the United States could in point of law insist upon its claim of property to the individual seals wherever they may be found, — whether it be three thousand miles south of the Aleutians, off the southern part of California, or elsewhere — yet the needs of the United States case do not require so high a position as that. Also, that while the property in the herd might be claimed by the United States, still it is not necessary to put it even so high as that. And ultimately we have come to this position — a very extraordinary position — that even if it be found, as I hope to make it clear it must be found, that neither in the seal as an individual, nor in the herd as a collection of individuals, does any legal pro-

perty exist in the United States, yet they have a legal right to claim, and a legal right to exercise, a power of protection over an industry founded upon the skinning of the seals upon the Pribilof Islands.

Mr President, from these observations you will have gathered, although I doubt not you were not unprepared for them, how widely we differ in the views which we take of the legal questions involved in this controversy. But the discussion has been exceedingly interesting; interesting to us as lawyers, mainly because of the courage — I will not say the audacity — with which my learned friends have propounded propositions of law which they affected to suggest were almost beyond question : propositions of law for which I hope to demonstrate there is no legal authority whatever.

Now let me glance at some of these propositions, They are certainly sufficiently startling. I shall have to come to closer quarters with them later, but I am at present endeavouring to present what I may be permitted to call a bird's-eye view of the field traversed by my learned friends. I address myself principally to the argument of my learned friend Mr Carter, because the argument of Mr Coudert was, as it seemed to us, in its major part at least, and in its more important part, addressed to the question of Regulations rather than to questions of legal right.

General propositions
maintained by United States.

Now what were some of these propositions? One was that the right of protection of the property and interests of a nation are exactly the same in time of peace and in time of war : from which my friend derives the comforting conclusion that ships of a friendly Power may be searched, seized, and confiscated because they are pursuing the oldest form of the pursuit of seals known in the history of the world — because they are pursuing pelagic sealing : and that the United States are entitled to exercise those rights of war in time of peace and against a friendly Power, although there has been no diplomatic expostulation or warning.

The next proposition is that the moral law and the law of nature are international law — that the terms are interchangeable; and, therefore, because the United States chooses to come to the conclusion that pelagic sealing is a crime — a grave moral wrong, and an indefensible act — therefore my friends come to the conclusion that it is to be classed with piracy; and that the sanctions which international law applies to piracy may be applied to the pelagic sealer.

Again, it is asserted that even if seals are (it is not admitted that they are) animals *feræ naturæ*, yet the property in them is in the United States, because they breed upon the Islands, and have the *animus revertendi* to them.

Now here I must] pause to point the two respects in which this last proposition displays, as it seems to us, a remarkable confusion of ideas. It confounds two rights perfectly clear and perfectly distinct.

One is the right in respect of animals *feræ naturæ* which the owner of the soil has, *ratione soli*, to kill those animals when they are on his

soil, sometimes called (I think, inaptly called) a qualified right of property : a right, in other words, which, by giving to the owner of the soil the right to exclude all others from access to it, secures to him the exclusive right, while the animals *feræ naturæ* are on the soil, of killing them. That is a distinct, clear, legal conception; a right recognized by the law as incident to property; and it is properly called the right *ratione soli*. But that does not touch or affect the question of property in those animals when they are not on the soil of the owner.

If they be domestic animals, or if they be animals which by the industry, care, and art of man have become assimilated to domestic animals, then a property may exist in them; and the right to possession follows that property even when they are off the land and out of the physical control of the owner. But the right *ratione soli*, which is exclusive of everybody else, and which is exerciseable only on the soil of the owner, does not give the property in animals *feræ naturæ* when they are on the land — much less when off the soil of the owner.

Again, a further confusion. *Animus revertendi* is referred to as if the mere fact of *animus revertendi* gave property; and in the argument of my learned friend, greatly to my surprise, he did not attempt to draw any distinction (indeed he said there was none), between the *animus revertendi* which was part, so to speak, of the nature of the animal, and the *animus revertendi* which alone has anything to do with the question of property, namely the *animus revertendi* which is induced by the art, the care, the industry of man. The two things are distinct. If *animus revertendi* gives property in animals *feræ naturæ*, then the law of every civilized country would have given property in pheasants, in rabbits, in hares, in almost every class of animal which is recognized as coming under the head of game; yet it is notorious that the law of every civilized country recognizes that there is merely the exclusive right to take the game when it is upon the land of the owner; and that when the game is off the land, although it has the *animus revertendi*, yet the law does not recognize the right of property on account of that *animus revertendi*, although in that case it is to some extent produced by the art and care of man himself.

The next proposition of my friend is this : Individual ownership ought to exist in all things susceptible of ownership, and ought to be affirmed to be in that Power which can best turn those things to account for the use of mankind. Therefore, says my learned friend, as the United States are the owners of the Pribilof Islands, and as they can kill the seals upon the Pribilof Islands with more or less discrimination, they are the owners of the fur-seals.

Next : No one is entitled to more than the usufruct of property ; therefore, pelagic sealing on the high sea, which may be, or is, wasteful of the stock, is an offence against international law.

And, lastly : although neither the municipal law of the United States, nor the municipal law of Great Britain (and I will add, nor the munici-

pal law of any civilized country) would recognize property in the seals as between individuals — supposing this were a case of private assertion of right, and the Pribilof Islands belonged to a private person, — yet international law can be invoked, says my learned friend, to declare the property in the United States.

Now, Mr President, I have to say most gravely and seriously that there is no one of the propositions essential to the case of my learned friend which he has propounded with which we can agree. It will be found, as I proceed to examine these propositions, that some of them are propositions in which the right conclusion is drawn from erroneous premises; some of them in which the wrong conclusion is drawn from correct premises; and, to vary the monotony, some in which both premises and conclusion are wrong.

Having mentioned these matters, in which I have expressed, as I am bound to do thus early in the controversy, my disagreement with my learned friends, I am glad to turn to some points as to which I find myself in agreement with them. I agree with Mr Carter as to the division of the questions submitted to this Tribunal. I agree with him that the first five questions — those in Article VI — are questions of legal right. And I agree with him that, as regards those questions, they are referred to you as judges and jurists. But what does that import? It imports that your duty is not to make the law, but to declare the law: not to speculate what the law ought to be, but to say what the law is: not to formulate or try to formulate novel rights, but to adjudge what are existing rights.

Before I proceed to state the order of my argument, I have some other topics to refer to. I think at the very threshold of this enquiry, as my friend has invoked international law and has gone the length of saying that international law gives him warrant for his claim of property in the fur-seals, and as he has put forward the extraordinary proposition that the moral law and the law of nature — what the law of nature in this connexion means I do not know — are two terms interchangeable with international law, — I think it is desirable that I should at the outset, (though I shall have to recur to it) and for the better understanding of my argument, state broadly to you at this stage what our conception of international law is.

View of United States
as to nature of International Law.

It may be admitted that all systems of law prevailing, I care not in what country, profess to be founded upon principles of morality, and upon principles of justice. Does it follow from that that every principle of justice, as one nation or another may view it, or every principle of morality, as one nation or another may view it, forms part of international law? By no means. International law, properly so called, is only so much of the principles of morality and justice as the nations have agreed shall be part of those rules of conduct which shall govern their relations one with another. So far as they have by agreement incorporated into the rules

which are to regulate their mutual arrangements, relations and conduct, and so far only, can there be said to be an incorporation of the rules of morality and of justice, as to which nations as well as men differ : so far and so far only can they be said to be incorporated into international law. In other words, international law, as there exists no superior external power to impose it, rests upon the principle of consent. In the words of Grotius, *Placuit ne gentibus?* is there the consent of nations? If there is not this consent of nations, then it is not international law : and I think it is very easy to illustrate that that must be so — that without that consent there cannot be said to be an *imprimatur*, which can give force and efficacy to international law. If it were not so, international law would be in a constant state of flux and uncertainty.

The ideas as to morality of civilised countries do not progress *pari passu*. There are many things which, according to some states of society, justice requires, or morality requires, but which another state of society, which boasts of a proud civilization, declines to recognize. Two instances occur to me ; I may refer to them in passing. Take the case of privateering. Privateering, as members of the Tribunal are aware, has again and again been pronounced by writers on international law, and by statesmen, as being the fruitful cover and source of piracy — as a foster-brother to piracy and, therefore, a thing to be put down ; and in the memorable Declaration of Paris of 1856, as the Arbitrators will recollect, Prussia, Austria, France, Russia, Sardinia, Turkey and Great Britain, assembled in Congress in Paris, agreed so far as it rested with them, and recorded it in the Treaty there signed, in a condemnation of privateering as against international morals. I think it is true to say that, except the United States of America, in this present day there is no considerable Power in the world that stands out against a condemnation of privateering. Will the United States admit that because all these great Powers concurred that makes international law ? No.

The United States, for reasons of its own which I am not at all concerned in discussing now, and which may be right or wrong, was not abreast with the other Nations in that line of thought. Take again another case, the question of the Slave Trade. As far as I know, there is no difference of opinion among any of the Powers which call themselves civilised, as to the immorality of, and the true character to be given to, the traffic in human beings. But Nations have differed as to the means which should be adopted for the purpose of endeavouring to put down that inhuman traffic.

As late as 1848, although the whole voice, I may say broadly, of humanity the world over has condemned the slave trade — and no country has gone farther to make sacrifices in the same direction, to its credit, be it said, than the United States — a Judge of the High Court in Great Britain, in the case of *Buron vs. Denman*, expressly declared that slavery is not an offence against the Law of Nations, and that ownership in slaves is not forbidden by the law of nations. There is a curious comment

made upon this proposition at page 7 of the written argument of the United States. After referring to a decision in the same sense in the American Courts, my learned friend Mr Carter, alluding to Chief Justice Marshall, says —

The Supreme Court of the United States, speaking through its greatest Chief Justice, was obliged to declare in a celebrated case that slavery, though contrary to the law of nature, was not contrary to the law of nations; and an English judge, no less illustrious, was obliged to make a like declaration. Perhaps the same question would in the present more humane time, be otherwise determined.

No sir, it would not. It could not, until nations have given their consent to its being treated as a crime against international law. These distinguished Judges, Chief Justice Marshall, in one case, and Baron Parke in the other, were not the *makers* of international law: they were but the *interpreters* of international law; and a Court such as this, or any Court of Judicature more permanent in its character, could do no more than they did, because there is not the necessary consensus of nations stamping with its *imprimatur* the traffic in slaves as an offence and crime against international law.

Now, this brings out, as it seems to me, in very clear relief the qualifications that are absolutely necessary to be introduced into this much too wide and, therefore, unsound general proposition of my learned friend; and I would like at this stage to show a little more amply, in opposition to it, what our case is on this point. The questions here to be decided must, at each stage of the discussion, be brought into juxtaposition with a clear, definite conception of what the law of nations is. I refer the Court to the Judgment of the Lord Chief Justice of England, Chief Justice Coleridge, in a comparatively recent case, known by the name of the “*Franconia case*”.

(It is reported in the 2nd Vol. of the Exchequer Division of the English Law Reports, under the name of *the Queen v. Keyn*. I have the report within reach, and it is at the disposition of any Member of the Tribunal who may desire to read it). He there says, as was in fact said with certain variations of language by all, or nearly all, the thirteen judges who took part in that judgment, that international law is nothing more nor less than the collection of usages which the civilized states have agreed to observe in their relations with one another. The law of nations incorporates many principles of ethics and of natural law; but only such as it is agreed shall be incorporated form part of that law. The phrase of Grotius, *placuit ne gentibus*, sums up the only possible and the only true idea of the law of nations; and when text-writers and theorists and diplomatists assert that such and such a usage is recognized by the law of nations, that such and such a usage is opposed to the law of nations, that such and such a right exists under the law of nations, in each case the criterion is not whether the rule so expressed, or the usage or the right so asserted, is humane, or is just, or is moral, the sole question is

whether it has received the assent and consent of civilized nations : *placuitne gentibus?*

Now, side by side with this conception of the law of nations, there is going on in the world a gradual change and a gradual growth of opinion. Nations are changing their customs, acted upon by external circumstances of their time, influenced by writers and thinkers, who in their turn are influenced by the circumstances of their time; and so there is a gradual formation of a body of opinion which helps to form in the future, aids and stimulates in the future, the recognition by this or by that extension of some principle which may afterwards be brought within the area of international law. There may be opinions, or doctrines, or usages, which perhaps are making their way in the world, are perhaps appealing more or less successfully to the sympathy of thinkers in the world, which are not yet part of the Law of Nations, because nations have not consented to them. They are not the Law of Nations, but only the material out of which, it maybe, at some future time some new principle of the Law of Nations may be developed as the world thinks wise; and I point to this for the reason that my learned friend in the citations from international writers that he has made, and in a much larger number which are given but to which he did not refer, did not draw that distinction which must be drawn between those writers and authorities, (I think erroneously called authorities), who deal with the subject with a view to discover the metaphysical grounds, the ethical reasons which may be advanced in support of this or that view, and those writers (much less interesting but much safer guides) who confine themselves to laying down what rules have in fact obtained the consent of nations. Therefore, it is important to call attention to the fact that because various writers are constantly propounding ideas of their own, suggesting these ideas as conformable to laws of natural reason and right justice, because they are convinced that their views on those subjects are right, — yet they are not to be accepted as authoritative exponents of what the law is; because neither doctrines derived from what is called the law of nature, nor philanthropic ideas as to what is just or humane, nor the opinions of text-writers however eminent, nor the usages of individual States even if submitted to and followed by other individual States, nor precedents, nor single instances, — none of these, nor all combined, constitute International Law at all; although, as I have said, they may help to stimulate the growth of public opinion among civilised communities, the outcome of which at some future stage, by means of some future development, may be the incorporation of these views, wholly or partially, into International Law.

Now, Mr President, I thought it well at an early stage, as I must recur to this later, to state in this general way the propositions which have to be discussed. But there is one other matter as to which I am glad to say I also find myself in complete agreement with my learned friend Mr Carter.

The President. — First may I beg to put a question? You speak of International Law as comprising the customs and usages of nations, on which different nations have agreed.

I suppose you mean not only by written agreement, but also by right of usage?

Sir Charles Russell. — Certainly. When I say “to which they have agreed”, ofcourse, I mean not merely or necessarily by a formal or express or written agreement, but by any mode in which agreement may be manifested, by which the Tribunal may arrive at the conclusion that they have so agreed.

Senator Morgan. — Including acquiescence?

Sir Charles Russell. — Certainly. I use “agreed” in that broad and general sense.

Lord Hannen. — As a question of evidence.

Sir Charles Russell. — As a question of evidence : the question always is, *placuitne gentibus*? You may prove that it has pleased the nations so to agree by any method by which that can be actually established ; by express agreement, or by usage, usage long and generally concurred in, and so forth.

I was saying there is one other point on which I find myself in agreement with my learned friend, and that is that the mode in which this question is to be determined by this Tribunal is infinitely more important than the question itself; infinitely better were it for the world that the seals should be exterminated, and that the articles of luxury which are derived from them should perish from the face of the earth — infinitely preferable were it that that should happen than that this Tribunal should deflect a hair's breadth, in the decision of the questions, from the true line of law. Now the importance of this question has been so often referred to by my learned friend, in language of great exaggeration, that I must beg permission for a few moments to reduce it to something like what we conceive to be its just and true proportions. My learned friends have spoken of this fur-seal industry, and of the supply of fur-seal skins for the benefit of mankind, as if, were that supply to cease, civilization whould receive a rude shock. I have only to say that fur-seal skins are not necessary to civilization, or to the happiness of mankind in this world or the next; that so far as the European uses of seal-skins are concerned, I believe I am right in saying that it is a luxury or a benefit that mankind, at all events in this part of the world, has only enjoyed for less than 40 years. I think I am right in saying that it was a distinguished naturalist, Mr Frank Buckland, who about the year 1856 discovered a method by which the longer and coarser protective hairs, which formed part of the peltage of the fur-seal, could be removed without injury, so as to disclose the closer and softer and more luxurious fur which forms the rest of the peltage — that it was only then that it came into use to any considerable extent in Europe at all. Civilization went on before the advent of the fur-seal : civilisation will

Importance of subject
to mankind over-rated
by United States.

go on if it should turn out, and we should be sorry if it so happened if it could be avoided, that the seal species should cease to exist.

I want to point out that although my learned friends have been entering into elaborate calculations as to the cost of Alaska to them, and as to the value of Alaska to them being dependent on its fur-seal fisheries, when Mr Sumner, a well known, and I need not say distinguished United States Statesman of that day, was recommending and justifying to the legislative body in the United States the purchase of Alaska, the references to the fur-seal were of the very faintest description

Seal fisheries not an important factor in purchase of Alaska.

He points to the fact (it is to be found in the first volume of the Appendix of the British Case, at page 79) that various animals were to be found in the Alaska region. He refers to the sea-otters, river beavers, land otters, black foxes, black-bellied foxes, red foxes, polar foxes, lynxes, wolverines, sables, swamp-otters, wolves, bears, musk-rats, seals — those are hair seals, as you will see in a moment — and so on. And lower down he refers to fur-seals, land-otters, sea-otters, walrus teeth and so on, and descants with great ability and clearness upon these various matters, but saying comparatively little about the fur-seal.

He then refers, on page 82, to what he considers the real value, namely, the *fisheries* in Behring Sea — the fisheries, that is to say, strictly so called. He says :

I come now to the Fisheries, the last head of this enquiry and not inferior to any other in importance; perhaps the most important of all. What even are sea otter skins—

Those were, the President will remember at that time, much more valuable than any other skins.

by the side of that product of the sea incalculable in amount, which contributes to the sustenance of the human family.

In very eloquent language he then descants on the great variety of fish in these regions — the halibut, salmon, cod, and the rest. I should not feel justified in troubling the Tribunal to read this at any length.

Senator Morgan. — Sir Charles, did Mr Sumner insist that they could sell, and the United States could buy those fisheries?

Sir Charles Russell. — No, I do not think he does. He was a much too reputable statesman for any wild proposition of that kind.

Senator Morgan. — Then we had access to them without buying them.

Sir Charles Russell. — Yes, you did not buy the fisheries, but the Alaska territory and such rights as were incident to it.

Senator Morgan. — I was enquiring what Mr Sumner said.

Sir Charles Russell. — Well, Mr Sumner was a statesman, and he nowhere says that you bought the fisheries in the open seas.

Senator Morgan. — I do not know why he alluded to the subject, unless he attached some value to the purchase of Alaska.

Sir Charles Russell. — Obviously, but what he was saying was this: Here is a great territory, Alaska, purchased by us, with a great sea-board, opening upon an ocean rich in all those things that the sea contains for the benefit of mankind — fish of various kinds: opening therefore to our increasing population new avenues of industry, new opportunities of enterprise and new fields of commerce.

But it never entered the mind of Mr Sumner to allege that, in purchasing Alaska, he was purchasing the property in the fish in the sea, or, indeed, in any of these things that I have enumerated; and he will not be found to have said anything of that kind; there was no idea that they were purchasing the exclusive rights of fishing in the open waters of the ocean; and especially there was no idea that they were buying in consideration of the value which the territory derived from the fact that furseals resorted there, as I will now proceed to show very clearly.

In 1876, a Committee of Ways and Means was appointed by the House of Representatives. And a resolution of the House was referred to it directing an investigation into certain matters relating to the lease by the United States' Government to the Alaska Commercial Company, and this is the Report of that Committee of Ways and Means: (it is referred to on page 70 of the British Counter-Case).

When the proposition to purchase the Alaska territory from Russia was before Congress, the opposition to it was very much based on the alleged barrenness and worthlessness of the territory to be acquired. It was supposed that though there might be many political reasons for this addition to the American Pacific possessions, there were not commercial or revenue advantages. *The value of those seal islands was not considered at all. Russia had derived but little revenue from them, indeed a sum not sufficient to pay the contingent expenses of maintaining the official authority,* — Under our system, however, we have a very different result.

And, on the same page 70, you will find, Mr President, an extract from, I think, the most authoritative book on the history of Alaska, I mean, Mr Bancroft's, in which he refers to a Committee of apparently a similar kind which was appointed in 1868. There he says:

The motives which led the United States' Government to purchase them (Russia's American possessions) are thus stated in a report of the Committee on Foreign Affairs, published 18th May, 1868. They were, first —

and this answers, if I may respectfully say so, Senator Morgan's question as to what were the objects of the purchase. —

the laudable desire of citizens of the Pacific coast to share in the prolific fisheries of the oceans, seas, bays and rivers of the Western World, the refusal of Russia to renew the Russia-American Fur Company in 1866; the friendship of Russia for the United States; the necessity of preventing the transfer, by any possible chance, of the north-west coast of America to an unfriendly Power; the creation of new industrial interests on the Pacific necessary to the supremacy of our empire on the sea and land; and finally, to facilitate and secure the advantages of an unlimited American commerce with the friendly Powers of Japan and China.

So much as to the motives.

Mr Justice Harlan. — It is not your point that the United States was

unaware of the existence of the seals there, but that they did not purchase specially with reference to their value?

Sir Charles Russell. — Quite so. I do not suggest they did not know fur-seals were there. I am endeavouring to reduce to what I consider to be its just proportions the character of the question that is involved.

The President. — In what you have just read, there is a phrase about the American Fur-seal Company which shows that the American Fur-seal Company, which was refused a new lease by Russia, had an influence in the transaction of 1866 or 1867; and that shows I think that the American Government were awake to the importance of fur-sealing at the moment. I do not mean to say it was the only motive, of course, because there are a number of different motives which are given; but the mention of that motive shows that the fur-seal question was not immaterial even at that time.

Sir Charles Russell. — My point is not at all that the United States did not know of these Islands, or may not have thought that there was some value in the fur-seal industry; it may have been considered to some small and limited extent; but I am citing Mr Sumner's speech to show that he does not put that in a prominent place. I cite the Report of the United States' Committee of Ways and Means to show the same thing; and, lastly, I cite the Report of 1876 in which these words are expressly used :

The value of those seal islands was not considered at all. Russia had derived but little revenue from them, indeed a sum not sufficient to pay the contingent expenses of maintaining the official authority.

The President. — Yes. I referred to the Committee of 1868.

Sir Charles Russell. — I am aware you did, sir; and I was referring to it also, to show that in 1868 they gave as their reasons for the purchase—

The laudable desire of citizens of the Pacific coast to share in the prolific fisheries of the oceans, seas, bays, and rivers of the western world; the refusal of Russia —

The President. — Yes, that is the phrase; and I point it out to your especial attention as indicating the influence of that company, which was an American company, upon the American Government*, — that they had been made aware of the importance of these fur-seal fisheries.

Sir Charles Russell. — I quite follow what you mean sir. I am not going at this moment to be diverted from the line I am pursuing; but it will be afterwards apparent that the company there referred to had much wider interests than in the fur-seal; they had trading interests all along the coast, and were succeeding one of the original Russian companies to a large extent, and from their point of view the fur-seal industry was only a part, though not a very considerable part of their affairs. That is all I meant to convey.

Then, the later Committee (as will be seen on the top of page 71 of

* But see page 741-2.

the British Counter-Case), say : “ The value of those seal islands was not considered at all. ”

The President. — Yes; that comes in much later; the other one was more contemporaneous with the transaction.

Sir Charles Russell. — Then, finally, on the same page 71, Mr Elliott, who is referred to very often by some of the witnesses called on the part of the United States as the sole authority upon the subject of fur-seals, says, in the beginning of that paragraph. “ Strange ignorance of their value in 1867. ” This, you see, is a Report made to the Government of the U. S., and recorded in 1881 among the United States Papers.

Considering that this return (that accruing from the fur-seal industry) is the only one made to the Government by Alaska, since its transfer, *and that is was never taken into account, at first, by the most ardent advocates of the purchase of Russian America*, it is in itself highly creditable,

and so on; and then he refers to Mr Sumner, and thus concludes :

Therefore, when, in summing all this up, he makes no reference whatever to the seal islands, or the fur-seal itself, the extraordinary ignorance at home and abroad relative to the Pribilof Islands can be well appreciated.

He is not accurate in saying that Mr Sumner makes no reference to the furseal; he does, and I have read the passage in which Mr Sumner makes reference to it, but as a matter of comparatively not much importance.

Mr Phelps. — As you refer to Mr Sumner, have you any objection to read the paragraph in his speech at the top of page 81?

Sir Charles Russell. — It is a very long speech, and it would probably induce me to read some other passages also; but I will do it with pleasure. Do you mean the passage which begins —

The *seal*, amphibious, polygamous, and intelligent as the beaver, has always supplied the largest multitude of furs to the Russian Company?

Mr Phelps. — Yes; that is the passage.

Sir Charles Russell. — I will read it, if you like, although it is giving an importance to the point which I did not intend to attribute it.

Among the furs most abundant in this commerce are those of the fox in its different species, and under its different names.

And then he deals with that, and says some of its furs are among the most precious; and he describes the various kinds. In the next paragraph he says,

Among the animals whose furs are less regarded are the wolverine —

And then he goes on,

Among inferior furs I may include that very respectable animal, the black bear, and so on.

Then he talks of the beaver, “ amphibious and intelligent ”, which has

a considerable place in commerce, and also a notoriety of its own, and so on. And in the next paragraph,

The marten is, perhaps, the most popular of all the fur-bearing animals that belong to our new possessions.

And then he goes on :

The seal, amphibious, polygamous, and intelligent as the beaver, has always supplied the largest multitude of furs to the Russian Company. The early navigators describe its appearance and numbers. Cook encountered them constantly. Excellent swimmers, ready divers, they seek rocks and recesses for repose, where, though watchful and never sleeping long without moving, they become the prey of the hunter. Early in the century there was a wasteful destruction of them. Young and old, male and female, were indiscriminately knocked on the head for the sake of their skins. Sir George Simpson, who saw this improvidence with an experienced eye, says that it was hurtful in two ways : first, the race was almost exterminated; and secondly, the market was glutted sometimes with as many as 200 000 a year, so that prices did not pay the expense of carriage. The Russians were led to adopt the plan of the Hudson Bay Company, killing only a limited number of males who had attained their full growth, which can be done easily, from the known and systematic habits of the animal. Under this economy seals have multiplied again, vastly increasing the supply.

I may supplement this on my own account with another passage.

I mention the sea-otter last ; but in beauty and value it is the first. In these respects it far surpasses the river or land otter, which, though beautiful and valuable, must yield the palm. It has also more the manners of the seal, with its fondness for sea-washed rocks, and with a maternal affection almost human. The sea-otter seems to belong exclusively to the North Pacific. Its haunts once extended as far as the Bay of San Francisco, etc.

The President. — May I be allowed to remark that the fur-seal which is actually in fashion seems to be used as a successor to the sea-otter. You are aware that in the French language, by the custom of French furriers, a seal skin is called *peau de loutre*, which means otter skin and not seal-skin. No lady would think of asking for *peau de phoque*.

Sir Charles Russell. — The sea-otter has practically disappeared.

The President. — Yes; it has practically disappeared.

Sir Charles Russell. — It has disappeared like the buffalo and other animals

Mr Coudert. — Like the southern seal.

Senator Morgan. — You made some reference to the statesmanship of Mr Sumner as being superior to the conception, as I understood you, that there could be any purchase and sale of fisheries in the open sea. That opinion has not always prevailed among the statesmen of the United States, I will say, for the reason particularly that in our Treaty of Peace with Great Britain in 1783 we found it necessary to incorporate in the treaty the following :

It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank and all the other banks of Newfoundland, the Gulf of St. Lawrence, and all other places in the sea where the inhabitants of both countries are accustomed to fish.

Of course if we had the open natural right of all mankind to fish in the sea that provision was entirely unnecessary in that Treaty. It was insisted on and put in.

The President. — I believe, Senator Morgan, it was an allusion to previous Treaties with France.

Sir Charles Russell. — I am much obliged to you, sir. That question of the disputed fishing rights between the United States and Canada on the Eastern coast of America is an illustration or an analogy — I do not know which to call it — relied upon by my learned friends to which I will come in the proper order of argument; but may I, as it has been introduced in this connection, point out that what I did say in reference to Mr. Sumner and Mr. Sumner's statesmanship was, that the extravagant idea never entered into his head that by acquiring Alaskan territory he was acquiring fishes or other free swimming animals in the sea. That is what I think I conveyed, or at all events what I intended to convey; but if I may be permitted to anticipate, the President has rightly, in a sentence, indicated the nature of the question dealt with in the Treaty referred to by Senator Morgan. The state of the case is shortly this: That, in conflict with France, Great Britain, then owning the colonies of America, claimed to have acquired, partly by concession, partly by Treaty: partly by assertion of a right, acquiesced in, though to some extent disputed, certain exclusive rights of fishery.

Senator Morgan. — But they were a hundred miles away from the coast.

Sir Charles Russell. — I do not care where they were, with great deference; it is entirely immaterial to the point I am upon. Then came the American rebellion, and the independence of America. It thereupon became a sovereign Power, and it claimed that as it had borne its part when a colony in acquiring these rights and in exercising these rights, it was entitled, as an independent Power, to a continuance of those rights which as a colony it had previously enjoyed. The contention on the part of Great Britain was that it had lost its rights by what it was pleased to call its act of rebellion, and that it had no right to share in those rights at all; and that matter was ultimately arranged by Treaties, only one of which you have referred to, but which I will have to discuss at a later stage.

Senator Morgan. — The question in my mind was this, Sir Charles: whether or not Great Britain and the United States had not in this Treaty of peace established the proposition that there was such a thing as ownership in the fisheries that were 50 to 100 miles away from the land, which became the subject of division of property between the mother government and the colony when the independence of the colony was accomplished?

Sir Charles Russell. — Absolutely no assertion of property in fishes or in any other animals whatever. There was, I agree, an assertion of rights of exclusive property undoubtedly, which is a very different matter. I do not need to tell the Tribunal that nations have many times — and

no two countries perhaps more prominently than Spain and Great Britain — claimed exclusive control of large stretches of the sea; but they have never, so far as I know, claimed the property in free swimming animals in that area, or that they were the property of either Government, or of any individual subjects of that Government.

However, that is going rather far afield. But I am upon a question which I desire to try to follow with some closeness of reasoning. I am now dealing with the exaggerated importance given to this question; and I assume, as the President said, that this question of the fur-seals may have been one amongst many others considered in the United States, but as far as I see not pre-eminently in the minds of the United States' advisers, upon the acquisition of Alaska. Their main motives undoubtedly were the motives which are set out in that Report of 1868, that it was opening a large field for new enterprise, an extent of commerce and new pursuits to a rapidly extending and growing population. But what followed the acquisition, what immediately followed and what my learned friends have themselves dwelt on as immediately following the acquisition of Alaska, shows how little conscious they were of the value, as they now conceive it to be, of these islands. What happened? In the year following the acquisition, 242,000 seals were killed upon the islands, and that not by the representatives of the United States or by persons authorized by them. In the following year, 1869, 150 000. In the following year, 1870, 87 000 : making a total in three years of close upon five hundred thousand.

Mr Forster. 1870 was under the lease.

Sir Charles Russell. 1870 was under the lease; perhaps so. These are figures with which I have no doubt Mr. Forster is familiar. They are taken from the published authentic accounts of the United States, the Tenth Census Report, and certain executive documents which are referred to.

Mr Foster. — We have disputed those figures in our case.

Sir Charles Russell. — Well, I do not know what you have not disputed; but since it is put in that way, I had better give the reference.

The President. — The general purport is admitted, I believe.

Mr Foster. — I would not have interrupted except that Sir Charles referred to my knowledge of the figures.

The President. — But, General Foster, I believe that the general purport is admitted, that in those two years there was a great destruction of the fur-seals.

Mr Foster. — There was a great destruction in 1868, and a lesser destruction in 1869.

Sir Charles Russell. — I have read the figures, 242,000 in 1868; 150,000 in 1869. The figures for the first year are taken from the Tenth Census Report of the United States, page 40. The figures for the second year are taken from Executive Document No. 32, page 37, of the 41st Congress. There need be no comment about these figures.

But there is another consideration. Who knows what part in the future, as a matter of relative importance, this seal fishery may have in the economy of the world, even from the point of view of the interest of the United States? We know that the United States have, all along this Alaskan territory, great salmon rivers, with nascent industries, which will only reach their full development when the growing population of the United States overflows to these to a large extent still uninhabited regions.

Who is to say that this fashion of the day which may, change to-morrow, may not entirely disappear: just as the fashion of the beaver disappeared when it was found that the ingenuity of man, by the invention of the silk hat, had supplied an article that was quite preferable to the "beaver"? Who knows that, compared with the permanent interest of the world in the great food supplies so much more largely in recent than in former years derived from the plentiful bounty of nature in the bosom of the seas, this ocean seal industry may not in a very short time indeed sink into a position of insignificance; and signs are not wanting that the citizens of the United States themselves regard it in that light. I should like to refer in this connection to only one manifestation of that opinion. I refer to the Report of the Board of Trade of Port Townsend, a port of Washington Territory, which you know, is immediately south of British Columbia, and abutting upon Puget Sound. I am referring to page 71 of the second part of Volume III of the Appendix to the British Case.

We do not believe that the lease of the "Pribilof Islands and adjacent waters" ever was meant or intended to mean the whole waters of Behring Sea; but that the limit of one marine league from the shore is the recognized limit, outside of which the waters are known to the civilized world as the high seas, where our citizens should be encouraged to pursue their avocations of fishing and hunting. It is shown by the reports of Government officials in the publication of the Tenth Census that the destruction of fish life by seals, sea lions, and other animals whose sole food is fish, is very largely in excess of the amount of fish taken by the whole of the fisheries of the United States; and to protect these ravenous animals is to cause the destruction of enormous quantities of nutritious food, which should be utilized as a means of supporting the lives of the millions of people in these United States.

The Chamber of Commerce consider that the order of the Government by act of Congress closing Behring Sea is an act, not for the benefit of the people to secure them a cheap article of food, but is for the sole benefit of a simple monopoly, to enable them to supply articles of luxury for the fashionable clothing of the rich. We believe this act of Congress to be a species of class legislation for the benefit of the wealthy few, and as such is opposed to the principles of sound policy; and we protest against its further continuance.

These views may be right or wrong.

Mr Phelps. — What city is that?

Sir Charles Russell. — Port Townsend in Washington Territory.

Mr Phelps. — I did not know there was such a place.

The Tribunal here adjourned for a short time.

The President. — Sir Charles, we are ready to hear you now.

Sir Charles Russell. — Mr President, to prevent a possible miscon-

ception, I wish to refer to the Report of the Committee of 1868, which has already been mentioned. It refers to the refusal of the Russian Government to renew the lease to the Russian American Company. The possible misconception I wish to guard against is the supposition that because the word "American" is used it was in any sense an American Company. It was not — it was the representative of the original Russian Company.

Mr Justice Harlan. — Of the Russian Company under its first name?

Sir Charles Russell. — Acting under successive Russian Charters, but not in any sense an American Company or owned by American citizens. I thought it possible the President might have had a different idea in his mind.

The President. — I thought in fact that Americans had got into the Company.

Sir Charles Russell. — No sir they had not. One other word. — I pay the greatest deference, I need not say, to what any member of the Tribunal calls my attention to, and in reference to the observation of Senator Morgan that the United States supposed that it was buying the fisheries or the fishes in the Behring Sea (as to which I used perhaps forcible language in suggesting it was impossible to suppose a gentleman of Mr Sumners' knowledge and statesmanship could have entertained any such idea), I would refer Senator Morgan to page 85 of the report of the same speech to which I previously adverted — (it is in volume I of the Appendix to the Case of the British Government) — in which he points out, quite accurately, what are the advantages which the owners of territory enjoy in relation to fisheries. It is in this language :

As no sea is now *mare clausum*, all these — (that is to say the fisheries to which he is adverting) — may be pursued by a ship under any flag, except directly on the coast and within its territorial limit. And yet it seems as if the possession of this coast as a commercial base must necessarily give to its people peculiar advantages in this pursuit. What is now done under difficulties will be done then with facilities, such at least as neighbourhood supplied to the natives even with their small craft ?

That is to say, the natives even with their small craft and with their imperfect appliances, by reason of their residence on the coast, had peculiar advantages in these fisheries, although as a matter of law and of right they were open to all the world. So he says the possession of Alaska will give special advantages to them in that regard.

It is right to point out that he uses this language in reference to fisheries in a more limited sense than the sense in which it has been used here. My learned friends have spoken of the Alaska seal fishery ; their Statutes have treated the fur-seal industry as a fur-seal fishery, and so forth. Mr Sumner was here particularly referring to fishery in a more limited sense ; he was referring more particularly and pointedly to fish of various kinds which he mentions, but he also mentions, among others, whales ; and there is no reasoning in that paragraph which would not

equally apply to any free swimming animal which you can find in the sea.

Senator Morgan. — I should be very much surprised to find that Mr Sumner had been digressing from the doctrine established at the time we obtained our independence, and traversing the idea that there was progress in international law.

Sir Charles Russell. — I am still endeavouring to get the Tribunal to realize something like a just view of the proportions of this case, and to discount the exaggerations which I suggest have been put forward on the part of the United States. Now I have to call attention to the fact that when I mentioned the possible case of it being found that this industry of fur-sealing, if encouraged and the species largely multiplied, might be found to conflict with more important general interests, I was not drawing upon my imagination, because we have actual experience in the legislation of other countries, that it has been found necessary to offer rewards for the extinction of animals of the same class. I would refer to the illustrations which are given, which the Tribunal will find in Vol. I of the Appendix to the Counter Case of Great Britain, page 177. The Tribunal, of course, will be prepared for the statement from me that we do not shrink from the legitimate consequences of the propositions that we are advancing.

We say, first of all, that even if the result (apart from any question of regulations which I am not now dealing with at all), of the unchecked exercise of what we claim to be our right of pelagic sealing were to be the extinction of the fur-seal, that would be no reason for prohibiting the exercise of our right, if the right exist. It may be the foundation of a consideration or argument why the right does not exist; but if the right exists, and if the consequences of its exercise be the extermination of the fur-seal, we do not shrink from those consequences.

But the point I am now upon, as, of course, you will see, is somewhat different. I am pointing out what other countries have found it necessary to do in this regard, and you will find the legislation in relation to the Baltic fisheries, at page 177 of volume I of the Appendix of the British Counter Case. Now I ought to tell the Court that this is legislation relating, not to the fur-seal, but to the hair-seal. It makes no difference in the argument, as the Tribunal will at once see. The hair-seal is an animal pursued for the sake of its skin. Its skin is an article of commerce. It may not be so important — I am not able to judge of it relatively — as the fur-seal, but it is an article of commerce for two reasons: first for the sake of its pelage, and next for the sake of the oil which can be extracted from its body; and notwithstanding an industry largely pursued, this is the legislation:

Destruction of the seal
may be necessary.

The constantly increasing number of seals on our Baltic Coasts has become so serious a danger to our coast fisheries that it appears high time to find ways and means to keep these injurious animals away from our shores.

Ten or fifteen years ago, when our fishermen still underrated their destruc-

tiveness, and at best were amused to see one of them, it was hardly thought possible that these animals would one day endanger the fisheries on the coast of Sleswick Holstein, where they formerly appeared only in small numbers, and at places where there was not much chance of their injuring the fisheries.

It is not easy to answer the question as to how the evil can best be remedied, for even the use of poisoned fish as bait (apart from the danger connected with this method) would not be of any use, because the seals are very choice in the selection of their food, and would only take to the dead bait if there was absolutely no chance to get fresh fish, a case which will hardly ever occur in the open sea. It might be recommended to make an experiment with bow-nets made of galvanized iron wire, painted-brown, like the color of the bow nets usually employed. The shape of these bow-nets should be that of the common bow-nets used for catching cod, but the entrances to the different chambers should be so arranged as to make it easy for the seals to slip in.

And thereupon there is a suggestion by Mr Hinckelmann as to what ought to be done.

Mr Justice Harlan. — Before you leave that, Sir Charles, I should like to ask, do you know whether that report was supplemented by legislation?

Sir Charles Russell. — That I do not know. We find that there is legislation in the case of Denmark. I am not sure about the other case, but I will enquire as to that.

Senator Morgan. — Is any of that legislation in force now?

Sir Charles Russell. — I have just said that I am not sure whether it was followed by legislation.

Then as regards Iceland this is the note :

The attention of the Legislative Assembly was not specially directed to this matter of protecting the fisheries, nor were laws enacted on this subject before 1885; and the present laws are in many instances primitive, imperfect, and inconvenient, according to the conditions of the country. One of the worst features is that in regard to seals, which are so injurious to the salmon fisheries. This is contained in section 4 of the following statute. The defective point about this bit of legislation is that in all salmon rivers (with one exception) and their mouths, where there are seals there are also seal catching places, so that the law is of little or no benefit to the salmon, as it is forbidden to disturb the seals in the places where they are at all easily accessible.

Section 4 referred to is as follows :

Section 4 : In rivers and their mouths where there are salmon, it is allowed to shoot or frighten seals, with the restriction that the inviolability of breeding and seal catching places, which are thus especially proclaimed, must not be infringed upon, except with the penalty of full damages, according to the estimate of good men nominated by the judge and sworn in Court.

Then as to Denmark there is this :

Owing to rewards now granted by the Fishing Society of Denmark, amounting to 3 kroners for each seal killed, according to the Copenhagen correspondent of our contemporary, " Industries " the extermination of seals is now being energetically pursued in Danish waters. It appears that in those localities where the fishery industry has been pursued with least success the seals most abound. A seal is seldom seen in the neighborhood of Middelfart, in the Little Belt, as the fishermen in that neighborhood are very active in fishing and seal hunting.

Au contraire, on the small island of Hosselo, north of Zealand, one man sent in the heads of no less than 120 seals, while another man sent in 40 within the last ten months. During this period 810 seals have been killed.

And, finally, there is a citation on the same page, taken from a United States paper of February of 1892.

The bay fishing in Essex County, Massachusetts, has been so seriously injured by the alleged depredations of seals that the authorities offered a bounty of 1 dollar each for killing them. During 1891 the fishermen killed forty-four on the coast, and in the rivers of the county.

I do not find there was any difference made between males and females; or that the laws of Nature, so strictly insisted upon by my friend Mr Carter, were regarded as standing in the way of what was a necessary attempt to protect a very valuable industry. I leave this subject with only one concluding suggestion. All the members of the Tribunal may not be aware — many of them I know are aware — that along the coast of Washington in United States territory, and along the coast of British Columbia, (and I think growing industries of the same kind are springing up farther north), are to be found great salmon fisheries, and great canning industries canied on in connection with these industries. I have myself seen them on the Willaumette River: they are on the Columbia River: they are on the Iradis River — they are on several other rivers along that coast. Now can it be doubted — is it possible even to suggest it? — that if it were found that those seals were, in a serious degree, interfering with these canning industries, either upon the British Columbian Coast or upon the Alaskan Coast, that it would not be perfectly within the right of those who were interested, by all legitimate means, by all means in their power, short of means which would do injury to the rights of some one else or cause unnecessary or malicious injury to any one else, to do what they pleased to exterminate these animals which were preying upon and injuring what they regarded as an important and valuable industry?

Senator Morgan. — Do you recollect whether Canada passed any Statutes offering a reward for killing seals, or whether they are in operation?

Sir Charles Russell. — I will enquire; I am not aware of any. I rather think there are some Regulations in that sense — (whether they amount to Statutes or not, I will not say) — relating to the fisheries on the east coast; but I will enquire and endeavour to supply the necessary answer.

Now I pass from that topic, in the consideration of which I have endeavoured to get the mind of this Tribunal in a fitting frame to consider according to its intrinsic merits and just proportion what this question of pelagic sealing really is. There are some other preliminary matters which I must also refer to. The Case, the Counter Case, the Argument, printed and oral, of the learned Counsel of the United States have been full of denunciations of pelagic sealing. It has not only been denounced as inhuman, but each act of the pelagic sealer has been denounced as a crime and a great moral wrong — a little worse than murder, and almost as bad as piracy. Now I wish to examine this for a moment or two, and see

Exaggerated view of
pelagic sealing taken
by United States.

whether there is not pervading this style of argument the same kind of exaggeration which was addressed to the subject of the industry itself.

We start with this initial fact, that the pursuit of the fur-seal by means of pelagic sealing is the oldest pursuit of the fur-seal historically known. We start with that fact. It is a pursuit which goes back, (to use my friend, Mr Carter's expression) to prehistoric times. It is a pursuit followed by the aboriginal inhabitants along the coasts in question. But there is also something more to be said for it. My friend Mr Coudert was sympathetic, as he always is, in his denunciation of the evil caused by the destructive agencies of man as regards seal rookeries in other parts of the world. How stand the facts? Is pelagic sealing, whatever its faults, accountable for that? No. In every one of the cases which have been referred to, the cause of the extermination of the fur-seal species was the indiscriminate slaughter *upon land*. I am not suggesting for a moment that there is not a difference between the system pursued by the United States and their lessees on the Islands and that pursued in the indiscriminate slaughter on the other rookeries in the world. But the fact remains that it has been slaughter *upon land*, and in no case slaughter *at sea*, that has brought about the extermination of the seal species in any of its accustomed rookeries.

Further : it is true to say that discrimination cannot be pursued in relation to pelagic sealing — at least *practically* cannot be pursued. I presume it would be possible to distinguish a full-grown male seal from a young seal, but I take it to be common ground between us that, taking the sizes of seals two and three years of age, it would not be practically possible to distinguish between a female and a male in the water. That is an advantage, *pro tanto*, in favor of land killing. But are there no disadvantages in land killing?

I have been unable to repress a smile when reading the beautifully descriptive, but most imaginative accounts, which are given in the literature of the United States, as to the merits and blessings of killing on land. In one passage the writer has gone to the length of suggesting that the seal herd, grateful for the protection of the United States, reposing with confidence in the humanity of man, had entered into a treaty with the United States — the word « pact » I think was used — that they would offer up a certain proportion of their skins yearly as a grateful tribute, in recognition of the protection that they derive from the beneficent rule of the Agents and Lessees of the United States.

Now, from these imaginative pictures highly creditable to the human sympathies, and to the imaginations also of those who composed them, I would like to turn in prosaic fashion to the actual facts? What are the actual facts? I am not now dealing at all, the Tribunal will understand, with any considerations which go to build up, in the estimation of the United States, their claim to property. I am simply considering whether there are not certain matters which ought to be borne in mind by this Tribunal in order that it may be able to consider this

question of pelagic sealing without having its reason distorted by passion or prejudice : whether there are not other facts which ought to be presented to it, in order to mitigate the tale of supposed horrors attendant upon the practice of pelagic sealing : horrors from which as they contend (but contend untruly as we submit) killing on land is free. Now for this purpose I may refer the Tribunal at once to chapter 14 of the Counter-Case of the British Government. It begins on page 260. Its subject is : “ Management of the Pribilof Islands by Russia and the United States ”. On page 261 there is a general statement, which I will not trouble to read, of the method of driving which is there practised, as the most injurious feature of the system practised on the Pribilof Islands, and it then proceeds to point out — citing authorities upon the subject — its unnatural and destructive character.

True nature of management and killing on the Islands.

But I turn from those general arguments and general statements to page 262, where citations, very *a propos*, are taken from the reports of Mr Elliott beginning as far back as 1872, that is to say five years after the acquisition of Alaskan territory from Russia. He says :

A drove of seals on hard or firm grassy ground, in cool and moist weather, may be driven with safety at the rate of half-a-mile an hour; they can be urged along with the expenditure of a great many lives, however, at the speed of 1 mile or 1 1/4 miles per hour; but this is seldom done.

Further on he speaks of the disposition of the old seals to fight rather than endure the panting torture of travel.

and on the next page he writes :

The progression of the whole caravan is a succession of starts, spasmodic and irregular, made every few minutes, the seals pausing to catch their breath, and make, as it were, a plaintive survey and mute protest. Every now and then a seal will get weak in the lumbar region, then drag its posteriors along for a short distance, finally drop breathless and exhausted, quivering and panting, not to revive for hours — days, perhaps — and often never. During the driest driving days, when the temperature does not combine with wet fog to keep the path moist and cool, quite a large number of the weakest animals in the droves will be thus laid out and left on the track.

This prostration from exertion will always happen no matter how carefully they are driven; and in the longer drives, such as 2 1/2, and 3 miles from Zapadne on the west, or Polavina on the north, to the village at St. Paul, as much as 3 or 4 per cent. of the whole drive will be thus dropped on the road; hence I feel satisfied, from my observation, and close attention to this feature, that a considerable number of those that are thus rejected from the drove, and are able to rally and return to the water, die subsequently from internal injuries sustained on the trip, superinduced by this over-exertion.

Then a citation is made from Lieutenant Maynard of the United States service. This is in 1874, that is to say eight years after the acquisition of the islands :

There has been a waste in taking the skins, due partly to the inexperience of the Company's Agent, and partly to accident and the carelessness of the natives. In

making the drive, particularly if they are long on, and the sun happens to pierce through the fog, some of the seals become exhausted and die at such a distance from the salt-houses that their skins cannot well be carried to them by hand, and are, therefore, left upon the bodies.

And the ancient Russian chronicler, to whom my friends Mr Carter and Mr Coudert more than once referred with approval, — a cleric or bishop, I am not sure which, — Veniaminof, writing with reference to 1842, thus shewing that this is not a new idea, says :

Nearly all the old men think and assert that the seals which are spared every year *i. e.* those which have not been killed for several years are truly of little use for breeding, lying about as if they were outcasts or disenfranchised.

And Captain Scammon, also of the United States service, says :

The loud moanings of the animals when the work of slaughtering is going on beggars description ; in fact, they manifest vividly to any observing eye a tenderness of feeling not to be mistaken. Even the simple hearted Aleutians say that “ the seal sheds tears ”.

Those, you will see, are early strictures upon this method of driving. I now proceed to shew that they are methods which are continued, and that they are marked by as great cruelty and aggravation as formerly.

Mr Phelps. — As to one of these extracts, it is right to say we claim that is a false translation.

Sir Charles Russell. — Which ?

Mr Phelps. — The translation to which you alluded, of the Russian author.

Sir Charles Russell. — Which is the one?

Mr Phelps. — Veniaminof.

Sir Richard Webster. — We will get the original ; we have never heard that before.

Mr Phelps. — It is in the Counter-Case. We have exposed it in the Counter-Case.

Sir Charles Russell. — I do not recollect that. At present what I am concerned with is this : that this extract, I wish the Tribunal to understand, from Veniaminof is taken, and taken correctly, from the Census Report, which is an official document furnished to the United States. I understand my friend Mr Phelps to intimate that in the way it appeared in that official document, it is erroneously translated.

Mr Phelps. — It is copied from Elliott's translation into the Report. The translation was made by Elliott.

Sir Charles Russell. — I was stating it correctly, I think. Therefore what I understand is this : When we rely upon an Official document of the United States, my friend retorts upon us and says : “ But the official of the United States has mis-translated some document which is referred to in that Report. ” Be it so. If it is so ascertained to be, let it be made apparent.

But now I go on to the next page, 264, and there we have his later ex-

perience. He says in 1890 — this is to be found in his Report furnished to us by the United States :

I can see now, in the light of the record of the work of sixteen consecutive years of sealing, very clearly one or two points which were wholly invisible to my sight in 1872-74. I can now see what that effect of driving overland is upon the physical well-being of a normal fur-seal, and, upon that sight, feel warranted in taking the following ground.

Would you be good enough to allow my learned friend, Sir Richard Webster, to read this page for me in order to give me a moment's pause?

The President. — Certainly.

Sir Richard Webster.

The least reflection will declare to an observer that, while a fur-seal moves easier on land and freer than any or all other seals, yet, at the same time, it is an unusual and laborious effort, even when it is voluntary; therefore, when thousands of young male seals are suddenly aroused to their utmost power of land locomotion over rough, sharp rocks, rolling clinker stones, deep loose sand, mossy tussocks, and other equally severe impedimenta, they in their fright exert themselves most violently, crowd in confused sweltering heaps one upon the other, so that many are often smothered to death; and, in this manner of most extraordinary effort to be urged along over stretches of unbroken miles, they are obliged to use muscles and nerves that nature never intended them to use, and which are not fitted for the action.

This prolonged, sudden and unusual effort, unnatural and violent strain, must leave a lasting mark upon the physical condition of every seal thus driven, and then suffered to escape from the clubbed pods on the killing-grounds; they are alternately heated to the point of suffocation, gasping, panting, allowed to cool down at intervals, then abruptly started up on the road for a fresh renewal of this heating as they lunge, shamble and creep along. When they arrive on the killing-grounds, after four or five hours of this distressing effort on their part, they are then suddenly cooled off for the last time prior to the final ordeal of clubbing; then when driven up into the last surround or "pod", if the seals are spared from cause of being unfit to take, too big or too little, bitten, etc., they are permitted to go off from the killing-ground back to the sea, outwardly unhurt, most of them; but I am now satisfied that they sustain in a vast majority of cases internal injuries of greater or less degree, that remain to work physical disability or death thereafter to nearly every seal thus released, and certain destruction of its virility and courage necessary for a station on the rookery, even if it can possibly run the gauntlet of driving throughout every sealing season for five or six consecutive years, driven over and over again as it is during each one of these sealing seasons.

Therefore, it now appears plain to me that those young male fur-seals which may happen to survive this terrible strain of seven years of driving overland are rendered by this act of driving wholly worthless for breeding purposes — they never go to the breeding grounds and take up stations there, being utterly demoralized in spirit and in body.

With this knowledge, then, the full effect of "driving" becomes apparent, and that result of slowly but surely robbing the rookeries of a full and sustained supply of fresh young male blood, demanded by Nature imperatively, for their support up to the standard of full expansion (such as I recorded in 1872-74), — that result began, it now seems clear, to set in from the beginning, twenty years ago, under the present system.

Sir Charles Russell. — Now at a later stage and in a different connection I shall have to draw the attention of the Tribunal again to the statement at the bottom of page 264 of the British Counter-Case as to the certain

destruction of its virility and courage necessary to the male seal for a station on the rookeries, as one cause which has contributed largely (with others I admit) to the deficiency in numbers.

Then on the same page is the Treasury Agent's (Mr Goff) Report for 1890. This has nothing to do, you will understand, with the Report of Mr Elliott. This is the independent Report of the Treasury Agent.

Sir Richard Webster.

Now, in opening the season it is customary to secure all the two-year olds and upwards possible before the yearlings begin to fill up the hauling grounds and mix with the killable seals. By so doing it is much easier to do the work, and the yearlings are not tortured by being driven and redriven to the killing grounds.

Heretofore it was seldom that more than 15 per cent of all the seals driven in the latter part of June and the first few days of July were too small to be killed but this season the case was reversed and in many instances 80 to 85 per cent were turned away. The accompanying percentage examples will shew the disposition of this year's drive. The first killing of fur-seals by the lessees was on the 6th of June, and the scarcity of killable seals was apparent to all. The season closed on the 20th of July, and the drives in July shew a decided increase in the percentages of small seals turned away and a decrease in the killables over the drives of June, demonstrating conclusively that there were but few killable seals arriving, and that the larger part of those returning to the islands were the pups of last year. The average daily killing for the season was 400, or a daily average of 522 including only the days worked... We opened the season by a drive from the Reef rookery and turned away 83 $\frac{1}{2}$ per cent, when we should have turned away about 15 per cent of the seals driven, and we closed the season by turning away 86 per cent., a fact which proves to every impartial mind that we were redriving the yearlings, and considering the number of skins obtained that it was impossible to secure the number allowed by the lease, that we were merely torturing the young seals, injuring the future life and vitality of the breeding rookeries to the detriment of the lessees, natives, and the Government.

Sir Charles Russell. — Then Mr Lavender, who was also an Assistant Treasury Agent of the United States, says in condemnation of these drives :

All the male seals driven should be killed, as it is my opinion that not over one half ever go back upon the rookeries again.

Then we come to an important paper read before the Biological Society of Washington by Mr William Palmer of the United States National Museum, in which he, writing in 1891, treats the subject on the same lines, and I will ask my learned friend to read that for me. It is proper to say, as indeed this extract shows, that he has enlarged, in the earlier part of this paper, upon the evils which he conceives to be attendant upon pelagic sealing, and then he proceeds to point out that pelagic sealing is not the only cause which has worked to the detriment of the seal.

Sir Richard Webster. — This is taken from pages 187 and 188 of the British Commissioners' Report ; but it will be found in part in the Counter-Case on page 266.

But pelagic seal fishing is not the only cause of the decrease of seal-life on the Pribilofs.

Probably an equal cause is the unnatural method of driving seals that has been followed on the islands since the first seal was captured.

The mere killing of seals as conducted on the islands is as near perfection as it is possible to get it.

They are quickly dispatched, and without pain. * One soon recognizes, as in the killing of sheep, that in the quickness and neatness of the method lies its success, all things considered.

But the driving is a totally different matter. I doubt if any one can look upon the painful exertions of this dense crowding mass, and not think that somewhere and somehow there is great room for improvement. It is conducted now as it always has been; no thought or attention is given to it, and, with but one exception, no other method has been suggested, or even thought necessary.

The fur-seal is utterly unfitted by nature for an extended and rapid safe journey on land. It will progress rapidly for a short distance, but soon stops from sheer exhaustion. Its flippers are used as feet, the belly is raised clear from the ground, and the motion is a jerky but comparatively rapid lope. When exhausted, the animal flops over on its side as soon as it stops moving, being unable to stand up".

The character of the ground over which the seals are driven is in many places utterly unfit for the purpose; up and down the steep slopes of sand dunes, over cinder hills studded with sharp rocks, some places being so bad that they are avoided by the people themselves; but the seals have been driven over the same ground for many years, and on some of the hills deep paths have been worn by the passing of tens of thousands of seals. No attempts have been made to remove the rocks or to lessen the difficulties of the passage and the seals are still driven pell mell over huge rocks and down steep inclines, where many are crushed and injured by the hurrying mass of those behind. When the drive reaches the killing ground it is rounded up and left in charge of a man or boy to await the killing, which begins at 7 a. m. A pod of perhaps 60 seals are then cut out of the drive and driver to the killers, who with long wooden clubs stun those seals that are of proper size and condition by a blow or two on top of head.

The seals that are not killed are then driven away by tin pans and a great noise, and while in an excited and over-heated condition rush as fast as it is possible for a seal to go into the icy cold waters of Behring Sea.

It will thus been seen that these seals are subjected on an average from 2 o'clock in the morning until 10 to a long drive over very rough ground, then to a dense herding, where they are continually in motion and crowding each other, thence to an intense excitement on the killing ground, and finally in a condition a little better than madness rushing into icy cold water.

Uncivilized and partly civilized man has no pity for dumb brutes, and as these drives are conducted entirely by the natives, who prefer indolence in the village to the discomforts of a drive in the fog and rain, it follows that the seals are often driven much faster than they should be, and absolutely without thought or care. But this is not all. The seals that are spared soon haul out again near a rookery, and perhaps the very next day are obliged to repeat the process, and again throughout the season, unless in the meantime they have crawled out on a beach to die, or have sunk exhausted to the bottom. The deaths of these seals are directly caused as I shall explain and, as far as I am aware, it is mentioned now for the first time.

Mr Palmer then states that he believes death to result chiefly from the consumption of the natural store of fat while the animal is too exhausted to go in search of food. He continues :

I remember looking with curiosity for the cause of death in the first seal I found stranded on the beach. Externally there was nothing to indicate it, but the first stroke of the knife revealed instantly what I am confident has been the cause of

death of countless thousands of fur-seals. It had been chilled to death; not a trace remained of the fat that had once clothed its body and protected the vital organs within... I opened many after this, and always discovered the same, but sometimes an additional cause, a fractured skull perhaps. I have even noted those left behind in a drive, and watched them daily, with the same result in many cases. At first they would revel in the ponds or wander among the sand dunes, but in a few days their motions became distinctly slower, the curvature of the spine became lessened; eventually the poor brutes would drag their hind flippers as they moved, and in a few days were become food for the foxes. In every case the fat had disappeared.

.....
During the eight years minority of the few male seals that have escaped their enemies it is safe, I think to assume that at least four summers were spent in getting an experience of the drives. Does any one think that they were then capable of filling their proper functions on the rookeries?

.....
The natives have been provided with whistles, and when a boat finds itself near a rookery (and a pretence for its presence is easily found) good use is made of them, with a consequent confusion among the seals and a probable increase in the next morning's drive.

Sir Charles Russell. — Now finally, after speaking of the method pursued on the Commander Islands, he contrasts the state of affairs as observed by him on the Pribilof Islands, in these words :

On the American side, on the contrary, the seals are driven as fast as possible, the only ones being weeded out being those too weak to go further, while of those rounded up on the killing-ground by far the greater number are allowed to escape. Out of a drive of 1103 counted by me only 120 were killed; the rest were released.

Now, upon that, the comment made by the British Commissioners is not, I submit, an unfair one, they say :

If it were possible to drive only those seals which it is intended to kill, little exception could be taken to the method of driving in the absence of any better method, but the mingling of seals of varied ages upon the hauling-grounds from which the drives are taken, even under the original and more favorable conditions of former years, renders it necessary to drive to the killing place many seals either too young or too old to be killed.

And then finally, at the top of page 269 of the Counter-Case :

Thus, it has occurred that, in late years, considerable and increasing numbers of breeding females have been driven to the killing-grounds with the killables, though when recognized there in the process of selecting for killing, they have been released.

Now I will only make this comment on that evidence to which I have referred : does it not seem to each Member of the Tribunal that the laudation bestowed upon the system on the Islands has been a little too unqualified : that it is difficult to say that their methods are not marked by inhumanity and cruelty, and that it is difficult also to say that they are not followed by waste, when you have got the statements by independent persons, representatives of and connected with the Executive of the United States, pointing to the loss by thousands of seals which, subjec-

ted to this unusual pressure of locomotion on land, for which nature never intended them, are then separated from the herd, and many of them die? They die immediately from the injuries they receive, and many become utterly useless for the purpose of breeding, their courage and virility being unduly affected.

One point remains. It is still to be said for their methods on the Islands that they make the attempt to discriminate and do discriminate between the sexes; but, even as regards that, the facts show, as I shall proceed to demonstrate at this moment, that they have of late years on the Islands themselves been committing that grievous moral crime of killing females.

Now, how is that established? It is established by the evidence referred to yesterday and also at a previous sitting by my friend Mr Coudert; but he only read (I am not making it a matter of complaint) quite naturally the passages in that evidence which were *ad rem* to the particular points that he was discussing. But I have to call your attention now to some of the other evidence, and I refer for this purpose to the second Volume of the Appendix to the Counter-Case of the British Government. I will begin at page 245. This is the evidence which my learned friends have been praying in aid, quite justifiably, upon another part of the case, — endeavouring to make out a distinction between the Alaskan and the Russian herds, as they have been called. I am not dealing with that point, as, of course the Tribunal understands, I am on the point that, according to the existing methods, there is inhumanity, there is waste, and there is not absolute discrimination as to sexes on the Islands.

I refer, first, to the gentleman who has received, I have no doubt quite justifiably, a high laudation from Mr Coudert, — I mean, Mr Stamp; and, if you read paragraph 5 of his affidavit, you will see that he says :

A noticeable feature about the consignments from the Pribilof Islands has been that, while formerly the consignments were entirely composed of male skins, of late years, from 1883 up to 1890 female skins have appeared among them each year in increasing numbers.

Then, on page 249, — I am only selecting those who are the most considerable witnesses referred to by my learned friend, Mr Coudert, — in the declaration of Mr. Bevington, paragraph 3, he says :

As regards the Alaska Catch, I have during the last four or five years noticed amongst them a small quantity, — say from 10 to 15 per cent. — of female skins.

And Mr Allhusen, on the same page, paragraph 3, says :

There is another feature in relation to the Alaska skins, namely, that they, for the most part, are entirely composed of male skins. Of late years, that is to say, from the year 1883 or 1884, I have noticed amongst this consignment a certain percentage of female skins, which percentage has increased in later years.

The same thing is to be found in paragraph 9, page 250, of the declaration of Mr Henry Poland; and there are several more in the same sense, but I will not trouble the Tribunal by referring to them.

I say, therefore, that it stands thus : I do not at all concede (I am sure the Arbitrators will understand this) that these considerations — and I will give the reasons when the proper time comes — have anything to do with the question of affirming the right of property, or the right of protection, which of course can be only incidental to that property. If there is no property, there is no protection, because there is nothing to protect; but I dwell upon this, because, I think it important to do so in order that the Court may see that the claim which the United States' Counsel have been instructed to make, or thought fit to make, that the system pursued on the Islands is wholly free from objection on the ground of waste or on the ground of cruelty, is a claim which, when the facts are examined, is seen not to be well-founded. There is certainly this to be said — and my learned friend, Mr Coudert, made it a subject of humorous observation, but it seems to me a just enough observation, — that the pursuit of the seal at sea does give the animal a chance of escape. The clubbing him on the head makes the islands a mere slaughter-house for the seal and gives him no chance at all. And after all there is this to be said for pelagic sealing, that at sea the seal is in his natural, or what I claim to be his natural element; and he has been furnished by nature with means of resistance to the attempts of man, with means of evading the pursuit of man, which give him a better chance of life and of escape.

Now my learned friends, as the Tribunal cannot fail to have noticed, have adopted a lofty tone in this discussion. I think you, Mr President, said that Mr Carter, in his eloquent address, spoke for mankind. He did. *How* he spoke for mankind I shall make apparent in a moment or two. But my learned friend, in effect, said this : “ We the United States are not making this claim from any selfish motives. We are here as the friends of humanity. We acknowledge that this is not our property absolutely. We are trustees for the world at large. We are trustees : mankind the *cestuis que trustent*. We only ask to be permitted in the interests of mankind, for the benefit of mankind, to perform our office as trustees, as friends of humanity, as philanthropists, as champions of the interests of the world ”.

Well, I am very far from doubting the sincerity of my learned friends; but I must be permitted to point out that, while accepting these professions as sincere, their demands seem to me to be exactly the demands which would be made by a selfish Power making an effort to secure the seals for themselves; for what do they say? “ We are the owners of the Pribilof Islands in Behring Sea. They are pleased pathetically to describe those Islands as the last home of the fur-seal ”. They say : “ Give to us, the tenants and owners of these Islands, the power to exclude everybody but ourselves from the great expanse of ocean in which those Islands are situate. Put an end to pelagic sealing in the Behring Sea, and not in Behring Sea only, but justify us in stretching out the arm of legal authority over a still wider expanse of ocean. Authorize us by your award to search, and if necessary to seize and confiscate, vessels that are

engaged in this inhuman, this immoral traffic, or vessels that we suspect are engaged in this pursuit; and having given us that authority we will recognize our duty as trustees to mankind by giving to mankind the benefit of the fur-seal at the market price": the market price being enhanced by two considerations: the considerations, first, the duty which the United States imposes upon every fur-seal skin taken on the Islands; and enhanced, next, by the fact of the monopoly which this demand implies and secures.

I will only take leave to say that that does seem to be a very extravagant view of the obligations of a trustee for the benefit of mankind, and that I do not see in what way this profession of the duty and obligation of the trustee differs from the assertion of the most exclusive and absolute right which the most selfish nation might assert in any subject of exclusive property.

I wish to make this position as to the conditions on which they offer this commodity to mankind pretty plain. If they disapprove — and I believe they do disapprove — of pelagic sealing, I am going to give them the benefit of a suggestion which will put an end to pelagic sealing. What is it that has made pelagic sealing worth the efforts and enterprise of the men who have now made it a considerable commerce? It has been the fictitious, enhanced value that has been put upon seal-skins by reason of the exaction which the United States make in respect of every skin brought in to their dominions — an exaction from which the territories outside their dominions are free. What is that? For this is a matter that I think is not yet in the apprehension of the Tribunal.

From 1870 to 1889 the United States were paid a yearly rental of \$55,000 for the tenure of these islands. In addition to that, they imposed a tax of \$2.62.5 per skin, which on a hundred thousand skins would amount, spreading the rental over the entire number, and adding, of course, the exaction per skin, to \$3. 15 per skin, or thirteen shillings in English money. From 1890 the rent was \$60,000 yearly rental for a lease from 1890 for twenty years, which would expire, therefore in 1810.

The tax was raised to \$9.62.5 per skin, and the limit was 60,000 skins per year; and in the same way, taking the yearly rental of \$60,000, and adding a proportionate part to the \$9.62.5 per skin, we find that the exaction in respect of each skin is \$10.62, or over 42 shillings, English currency. There is the secret of pelagic sealing. Those who think they have the right to pursue it, United States citizens be it noted amongst the rest, Canadian settlers amongst the rest, subjects of the Queen inhabiting these parts, are tempted to engage in it; and it is that very exaction which supplies the motive and gives the reason for pelagic sealing. I need not say that I am not questioning the right of the United States in its wisdom and judgment to impose any tax it pleases, under any conditions it pleases, upon those who are subject to its rule. That is not the object of my argument. My argument is to show that it is this

very exaction which gives to those who are outside the dominion of United States law the freedom from that exaction which supplies the motive without which pelagic sealing would not be an existing thing to-day. I do not doubt the sincerity of my friends. If those who instructed them, if those who actuate the policy of the United States, desire sincerely, as trustees with no selfish purpose, as trustees for the benefit of mankind, to send these blessings abroad, to send them abroad on reasonable terms, and above all, while they are doing that, to put an end to pelagic sealing, the remedy is to be found in the direction which this suggestion of mine indicates.

Senator Morgan. — Sir Charles, do you know whether the price at which the United States have taxed these skins has had the effect of raising the price of the Russian and Japanese catches?

Sir Charles Russell. — I am not able, sir, off hand, to say; but I should say certainly it would have that effect too.

Senator Morgan. — I have not seen any evidence of that fact in this case.

Sir Charles Russell. — I think some of it will be forthcoming a little later.

I am really tempted to exclaim — I mean no offence to my learned friends — when the argument is put forward in this specious way, I am tempted to exclaim with Dr. Johnson, our great lexicographer, “ Let us rid our minds of cant ”. Let us approach this question fairly, look it straight in the face, let us hear as little as possible in the future in this argument about these high philanthropic aims, this benefit to mankind, and all the rest of it.

Mr Justice Harlan. — Will you explain how the exaction of the United States, to which you have referred, increases the price in the London market of seal-skins taken in the North Pacific by pelagic sealers who do not have to pay this exaction?

Sir Charles Russell. — Of course it is that very consideration which gives to the pelagic sealer in the North Pacific his margin of profit.

Mr Justice Harlan. — I can understand how those who take them on the Islands and have to pay those exactions must ask a certain price in London in order that they may get sufficient profits; but if the pelagic sealers are not subject to those exactions, can they not undersell those who carry skins from the Pribilof Islands to the London market?

Sir Charles Russell. — My answer is very brief. The price of the article in the ultimate market to which it finds its way, although it may be in some stages influenced by the cost of production, is ultimately and mainly influenced only by the question of supply and demand; and therefore the pelagic sealer, although of course he could afford to sell the skin at a lower price, will not sell it at a lower price than that which the market commands. The difference between the position of the pelagic sealer who is outside the area of United States legislation and the man who is within it, is that the one man has to pay this tax and the other has not. That is the difference.

The President. — Would you go so far as to say that pelagic sealing would be utterly impossible if there were not this tax to pay to the United States — that the expense, for instance of pelagic sealing would be too great for the skins caught at sea by pelagic sealing to fetch a marketable price?

Sir Charles Russell. — I should not like to commit myself to that statement, sir, without some consideration. I should not like to say that pelagic sealing would entirely cease; but certainly it would not offer the inducements which the existing state of things does offer to pelagic sealing, for the obvious reasons that my learned friends have enlarged upon. They have established — I think satisfactorily established — that if there is no tax, the man who clubs the seal upon the island can bring the skin of that clubbed seal to the market upon cheaper terms and with less expenditure of labour than the man who has to pursue it in the open ocean; but I should not like to go the length of asserting that it would necessarily put an end to it entirely. Certainly it would to a very large extent.

Senator Morgan. — Sir Charles, it is proper, I think to remark in regard to the policy of the United States Government in taxing the take of the seals there that it is to sustain the Government. This is the only industry upon those islands; and I think that the United States is the only country in the world whose Constitution prohibits its Government from levying an export duty. I think it is the only one.

Sir Charles Russell. — I take the liberty of saying, sir, that I did not presume to offer any opinion in the sense of condemnation, or even of adverse criticism upon what the United States choose to do. I was merely dealing with the pretensions put forward that the United States were appearing in this matter simply as champions for the interests of the world, as friends of humanity, and were merely offering as trustees or intermediaries this article of luxury for the benefit and in the interest of mankind, or of womankind.

A complaint has been made, Mr President, which I must notice in passing, by my learned friend Mr Carter, and referred to also by my friend Mr Coudert, which took this form: that if Canada had not intervened this arbitration need never have been held — in other words that the United States and the Government of the Queen would have come to terms in the matter. Is it quite right that that theme should be introduced at all? Who have a better right to speak in this matter than those who are directly interested? Who?

United States criticism
of Canadian position.

To the United States, with its boundless resources, this is a very small matter; to Canada, comparatively poor, a struggling but a rising colony, it is a matter of considerable importance; and surely, as the voice of Canada cannot be heard diplomatically as between her and the United States, it was not only the right but the duty of those who represented her to put forward their views, and to put forward their views as strongly as they could, as to the nature of the interests involved and the loss

that might result to Canadian enterprises and commerce if the course indicated by the United States were acquiesced in. I think America ought to be the last country, its representatives the last people, to seek to limit the rights of expostulation and of action on the part of colonists. They held a very free and very correct view of their rights in that regard while they were still colonists; and in the time of Lord North, the Lord Salisbury of that day, they showed very clearly, very plainly, and, as I believe, most justifiably, that they were the best judges of what their own interests as colonists demanded.

I pass from that. A complaint has also been made about the British Commissioners; and I think it due to those gentlemen, both of whom I have the honour of knowing, to say a word or two about them.

United States criticism
of British Commis-
sioners. I think before their conduct was criticised, before my learned friends with more or less vehemence asked this

Tribunal to regard them as partisans, as hostile witnesses from whom they were at liberty to extract any admission which was in their favour, but were at liberty to discard all that was not in their favour — before they pronounced a judgment as to the manner in which those gentlemen had performed their duties, I think it would have been right in common fairness if my learned friends had referred to the mandate under which those Commissioners acted. If they had done so, I think they would have seen that it was impossible for them to keep out of sight in their Report what they conceived to be the evils both of management on the islands and the evils of pelagic sealing, as to which they frankly and openly avowed their opinion. Their authority was derived from two documents which are put as the preface to their Report. The first is the letter of Lord Salisbury, of the 24th of June 1891. It is in the preface to the Report, and begins with this statement :

The Queen having been graciously pleased to appoint you to be her Commissioners for the purpose of inquiring into the conditions of seal life in Behring Sea and other parts of the North Pacific Ocean, I transmit to you herewith Her Majesty's commission, etc.

Let me in passing point out a mistake into which I venture to think my learned friends have fallen when they refer to this in another connection, which I am not now dealing with ; but as it is under my eye, and as I probably shall not need to recur to it again I wish to make the correction in passing.

My learned friends claim this mandate, applying not only to Behring Sea but to other parts of the North Pacific Ocean, as supporting their argument that regulations, protection, and jurisdiction outside of Behring Sea was contemplated in it. I wish to remind the Tribunal, that there is in this a confusion. In the diplomatic correspondence, beginning in the time of Mr Secretary Bayard and renewed again after a long interval, there are two lines of negotiations running on side by side almost. One of these is the consideration of the questions which have arisen in difference between Great Britain and the United States, and which, as I shall

hereafter in another connection demonstrate, relate to Behring Sea and to Behring Sea only. But in addition to that there was a suggestion put forward by Mr Bayard, and assented to by the British Government, as to an inquiry which should not be confined to Great Britain and the United States, but which should extend to other Powers interested.

The suggestion had its origin in the note, which, you will recollect, sir, was addressed by Mr Bayard to various Powers asking for their co-operation. It was in view of that general inquiry, not restricted to the United States and to Great Britain, that the idea of the commission was originally started; but side by side with that, distinct from that, and, as Mr Wharton says in one of the letters to which I shall hereafter refer, without prejudice to the questions in dispute between the United States and Great Britain, this question of the larger commission was being considered.

Lord Salisbury then proceeds :

The main object of your inquiry will be to ascertain "what international arrangements, if any, are necessary between Great Britain and the United States and Russia, or any other Power, for the purpose of preserving the fur-seal race in Behring Sea from extermination."

You will recollect, sir, that this idea of the Commission had originated long before the Treaty was signed.

He proceeds.

Application has been made to the United States for permission for you to visit the seal islands under their jurisdiction, and a similar request will be addressed to the Russian Government.

I pause here to ask, what was the object or the use of their having permission to visit the Commander Islands and the Pribilof Islands, unless it was to note what they saw, and, so far as it was relevant, to record, note, criticise, comment on the conditions of seal life?

Your attention should be particularly devoted to ascertaining (1) the actual facts as regards the alleged serious diminution of seal on life the Pribilof Islands, the date at which the diminution began, the rate of its progress, and any previous existence of a similar occurrence; (2) the causes of such diminution, whether and to what extent it is attributable (a) to a migration of the seals to other rookeries, (b) to the method of killing pursued on the islands themselves, (c) to the increase of sealing on the high seas, and the manner in which it is pursued.

Then they are enjoined to neglect no sources of information, and to carry on their inquiry with impartiality.

Then at a later stage—it is the only other extract with which I shall trouble the Court, — at the top of page vii, after they have been abroad, a further letter is directed to them on the 15th of January, 1892, only one passage of which I intend to read.

You will observe that Lord Salisbury says, and this is before the report is drawn out —

that it is intended that the Report of the Joint Commissioners shall embrace

recommendations as to all measures that should be adopted for the preservation of seal life. For this purpose it will be necessary to consider what regulations may seem advisable, whether within the jurisdictional limits of the United States and Canada, or outside those limits. The Regulations which the Commissioners may recommend for adoption within the respective jurisdictions of the two countries will, of course, be matter for the consideration of the respective Governments, while the Regulations affecting waters outside the territorial limits will have to be considered under clause 6 of the Arbitration Agreement.

I say that no candid man—and I think my friends are candid men—could read this without seeing that it was impossible for the Commissioners to have avoided going into the matters which they did go into. The consideration of pelagic sealing involved the question whether it had necessarily incident to it all the evils which were attributed to it; the consideration of the management of the islands involved the questions whether it was the impeccable system which its friends professed it to be, or whether there were not to be found in this management some explanatory contributory cause of the admitted decrease in the numbers of the seal herd.

Mr Carter. — I did not object to their going into those things. You do not impute that to me; do you?

Sir Charles Russell. — I rather thought my friend's argument — I may have misconceived it — amounted to this : "I, counsel for the United States" — and from that point of view I can quite understand my friend's position — "begin by laying down the proposition that pelagic sealing is a moral crime, that it is an unjustifiable wrong, that it is brutal, something a little worse than murder, and almost as bad as piracy." From that point of view I can quite understand his impatience with a man who has anything to say even in mitigation of pelagic sealing; but from the point of view of the Commissioners, I venture to say that they were perfectly within the lines of their duty, nay, that they would not have fulfilled their duty, provided they did it honestly, if they had not presented their views for consideration. But, as a matter of fact, if you will examine that very lengthy Report of the British Commissioners, it will be found that nine-tenths of it is a record of facts; and perhaps the highest tribute — it ought to be almost enough for me to say this — the highest tribute to their impartiality is to be found in the fact that in the enforcement of their positions on the subject of regulations, and indeed in some respects upon the subject of property, my learned friends have cited much more frequently from the Report of the British Commissioners than they have felt themselves justified in citing from the Report of their own Commissioners.

I am not going to make any attack upon the United States Commissioners. I have no such purpose. They take the standpoint that no killing should be permitted except upon the islands. If the British Commissioners had followed the same line of argument, I suppose that they would, if they had been partisans, have insisted that no killing should take place except at sea; and they certainly would have had this in their

favour, as I have previously pointed out, that whatever else may be said of pelagic sealing, it cannot be truly convicted of ever having caused the extermination of the seal in any part of the world where pelagic sealing merely was practised.

But in this connection, and before the Tribunal rises, and in order that I may dismiss this topic, I would point out that both my learned friends take this lofty tone as regards pelagic sealing : yet driven by pressure of argument going on involuntarily in their own minds, aided a little, I will admit, by certain questions addressed to them in the course of argument from the bench, my learned friends have been

obliged to pursue a course utterly and completely inconsistent with their profession as to pelagic sealing. Why?

Position taken up as to Indians inconsistent with general argument of United States.

Because my learned friend, Mr Carter, driven, as I say, by stress of argument and by the natural candour of his own mind, not completely under control, says : “ I must admit that Russia when she discovered the Pribilof Islands, acquired the rights in the Pribilof Islands and in the fur-seal industry connected with them, subject to the moral right of the native Indians to pursue pelagic sealing. ”

Moral right to pursue pelagic sealing! Moral right to commit an indefensible wrong! Moral right to commit a crime against humanity! Moral right to commit an offence a little worse than murder, and almost as bad as piracy! My learned friend had not appreciated the length to which that inconsistency leads him, and the position in which it lands him. His idea seems to have been that there were a few straggling Indians along this coast, existing from a pre-civilized occupation, who used to go out in their canoes, and when impelled by hunger or the urgent need of raiment killed fur-seals. ” “ Quite right ”, said my learned friend, Mr Carter. “ Yes; kill a fur-seal for the necessities of your stomach and for the necessities of your back ; but if you do more than that it is a crime. Kill for your stomach. Kill for your back ” — probably he would also extend it to the backs and stomachs of the other members of the family — “ but beyond that you must not go. Barter you dare not, you cannot. The destructive agencies of civilization and commerce come in. Once you do that, you are beyond the pale of civilization ” : and international law, in some incomprehensible way, is down upon him. He is *hostis humani generis*.

I need not say that is an impracticable kind of limitation to seek to imply; but it is not only impracticable to imply it, but as a rule at all applicable to the condition of things on this coast it is wholly foreign to it. What is the fact? My learned friend forgets that the Hudson's Bay Company, which owned a Charter as far back as the time of Prince Rupert, acquired territorial dominion in the way in which sovereigns were accustomed to grant territorial dominion in those days, over all the territory stretching westward from and contiguous to Hudson's Bay; that that company had been carrying on this commerce, and a great commerce in furs of all kinds, fur seals amongst the rest, although to a limited extent, by

this very system of barter with these natives along that coast. My learned friend forgets also that under a lease from Russia before the sale of Alaskan territory to the United States, for a number of years the Hudson's Bay Company had a lease of an important part of this very Alaskan territory from Russia, and in the same way along this very coast was securing by barter from the natives all the pelts on that coast, including, to a limited degree I admit, the fur-seal amongst the rest. In other words, it never was the case, so long as there was any approach of civilized man to the neighborhood at all, that there was a limitation of pelagic sealing to meet the mere necessities of the hunter, or the mere need of clothing. They have lived by it. They have bartered the products and the result of their hunting and of their industry, and so far from their being scant of raiment, and so far from their raiment consisting of what I may call barbaric material, I am told that these gentlemen, on their Sundays and holidays, sport tall hats and linen shirts, and vestments made by more civilized people than themselves; and amongst other things they own schooners.

Mr Foster. — In these last days.

Sir Charles Russell. — Well, they are progressing in civilization, I agree.

Mr Foster. — And in pelagic sealing.

Sir Charles Russell. — I do not see that that helps my learned friend at all. If they have done that, you see how fatal that is to the argument of my friend, Mr Carter; because we have got beyond the days when the skin was necessary to be girt about the loins. We have got beyond the days when the food of the seal was needed to satisfy the primary wants of the natives.

The President. — Could you tell us, Sir Charles, at what time that lease between Russia and the Hudson's Bay Company was made?

Sir Charles Russell. — Certainly, Sir. I shall be able to give you satisfactory information about it. I have not got it at this moment.

The President. — We should be pleased if you would give us that information.

Sir Charles Russell. — Certainly, Sir.

The President. — We have decided to sit to-morrow. Although it is Ascension day, the earnestness of our task prevents our making a holiday of it, and we will sit at the usual hour.

The Tribunal accordingly adjourned until Thursday, May, 11, 1893, at 11.30 o'clock A. M.

TWENTY-FIRST DAY. MAY, 11TH 1893

The President. — Sir Charles, if you please, we are ready to hear you.

Sir Charles Russell. — Mr President, I have only an additional word or two to say upon the subject of the attack, made courteously, I admit, upon the British Commissioners. I understand the main point of that attack to be that they, instead of condemning, said something to justify and to recognize the fact of pelagic sealing. I wish now to refer to the passage to which specific attention was called by my friend. It is section 102 of the British Commissioners' Report. I will read it, and also section 103.

In regard to interests, the sealing industry is naturally divided into what may, for the sake of brevity, be termed the shore and ocean interest respectively. The rights in either case are indisputable, and the possessors of one class of these rights will not willingly allow them to be curtailed or done away with for the mere purpose of enhancing the value of the rights of their commercial rivals. Thus the only basis of settlement which is likely to be satisfactory and permanent is that of mutual concession, by means of reciprocal and equivalent curtailments of right, in so far as may be necessary for the preservation of the fur-seal.

It may be added, that the line of division between the shore and ocean interests is not an international one, and that the question of compromise as between the two industries cannot, in consequence, be regarded strictly from an international point of view. If we may judge from the respective number of vessels employed, the interest of citizens of the United States in pelagic sealing is at the present time approaching to an equality with that of Canada, while Germany and Japan have been or are represented in sealing at sea, and other flags may at any time appear. The shore rights, again, are at present chiefly divided between the United States and Russia, although Japan owns some smaller resorts of the fur-seal.

The Tribunal will see that the Commissioners are there presenting the consideration of the shore and ocean interests, as they designate them, not merely as a matter in contention between the United States, on the one hand, and the subjects of Great Britain upon the other, but they are speaking of those rights generally. They point out in the next passage that it is not an international difference merely between Great Britain and the United States, because the citizens of the United States themselves take a large and important share in pelagic sealing; and therefore the observations in those paragraphs are not confined to Behring Sea, still less to the eastern portion of Behring Sea, in respect of which the United States asserts special and peculiar claims. It must not be forgotten that, treated in that broad sense, pelagic sealing is a fact which has never been questioned, even by the United States, outside Behring Sea until this controversy has arisen.

Do not let it be forgotten that although the United States, *quod*

foreigners, are restricted in efforts of legislative control absolutely to territory, — that is to say, although the effect of their legislation, as against foreigners, is confined to and does not extend beyond their own territory, an admitted principle I need not say — yet their legislation may apply to the whole world as regards their own nationals. In view of this complaint against the British Commissioners that they recognized pelagic sealing and spoke of the right of pelagic sealing we find therefore this remarkable state of facts : First, that the United States has never by any legislation pronounced pelagic sealing to be a crime or a wrong if committed by its own nationals outside a given area; and next we have the further extraordinary fact, — all the more extraordinary when it is borne in mind that what the United States claimed the right to do as regards the ships of other nations is claimed by them as a mere protective right, — that they have never even affected to exercise that protective right outside Behring Sea even against their own nationals. The Tribunal is aware that the seizures have been confined to Behring Sea, and that there has been no pretence of even any attempt to restrain, by executive or by legislative action, pelagic sealing outside that area.

Now I have said all that I desire to say in defence of the Commissioners. So far as they are chroniclers of fact their good faith is not questioned by my learned friend : so far as they express opinions and make suggestions, those will be judged by this Tribunal upon examination according to their intrinsic merits. I only pause to point out that they have spoken in general of the right of pelagic sealing, a right I say which has never been questioned till this controversy has arisen. They then in the succeeding paragraphs proceed to consider the case, so far as that question of pelagic sealing comes into controversy as between the United States and Great Britain.

I leave this subject, not venturing to express any opinion of my own, which I conceive not to be quite regular; but humbly submitting to this Tribunal that the more the details of this Report are examined the more it will be found that these Commissioners have approached the subject with perfectly free and open minds, and have only embraced in their consideration topics which, by the terms of the mandate under which they were acting, they could not properly have excluded.

Now I have only one other matter to observe upon before I come to closer grips with the actual questions in this case. I have to draw the attention of the Tribunal to the extraordinary novelty of the claim which is here asserted. This idea, if I am able to convey it to the minds of the Tribunal, must have a very serious effect in arresting the attention and fixing the mind of each member of it upon the legal considerations, and the consequences which will follow if the right is declared to be based on legal considerations. I said yesterday, I repeat it to-day, that at various stages of the world's history, according to their varying powers, nations have from time to time advanced extravagant pretensions. They have largely acted in assertion of

Novelty of claim of
United States.

those pretensions upon the consideration, so it must be admitted, of their power to give effect to them. It would be idle and hopeless to undertake the task of justifying on high moral grounds, or on principles of abstract justice and equity, many principles and many acts performed by many Governments at various periods of the world's history. But those are, generally speaking, pretensions of a comparatively remote period, and before the moral force of public opinion of the world was the great controlling power which it is to-day, when the rule of might rather than the rule of right prevailed. Amongst the Powers who advanced those great pretensions, prominent among them, unquestionably, were Great Britain and Spain. They were not the only ones, for there is hardly a great Power of which the same may not be said. Amongst those pretensions were assertions of control, dominion, and sovereignty over a large extent of ocean, without physical boundary, and without any external marks of delimitation; but even in those days of assertions, unjustifiable as I believe them to have been in most cases — certainly in many — I find no record of any claim to the property embraced in those extended limits over which dominion and sovereignty were so claimed. There was undoubtedly in connexion with those assertions, and consequent upon them, a claim to exclude others from the given area — a claim to exclusive right to deal with whatever was to be found in that given area. But that is a very different thing from an assertion of property in the particular things, the particular animals which may inhabit that area; and I say, subject to be contradicted, but without fear of contradiction, that this is the first time in the history of the world that a nation or an individual has ever claimed property in a free swimming animal in the ocean. I say, further, it follows from what I have already said, that this is the first time that an attempt has been made to differentiate one particular animal from all the other animals that dwell during a large part of their existence in the ocean.

I do not know that my learned friends would even say they were called upon to differentiate the case of the seal from that of other animals. If they made the attempt so to differentiate it, I think they would find it difficult; but to examine that field of enquiry at this moment would be to take me from the line of argument along which I am advancing.

Now, if I am well founded in this observation, it is a startling matter; and one is not surprised, therefore, to note some difficulty in finding any authority, ancient or modern, in support of this novel claim.

It is creditable indeed to the writers and publicists of America to-day that I do not know one among them, and I have made some enquiry in order to inform myself upon the subject, of reputation and authority who has been found to justify the claim which the United States put forward of property in the seal or in the seal-herd. We find a good many who take the opposite view. My learned friend Mr Phelps indeed, is the patentee of one idea, (if an idea, by the way, can be patented), upon which a great part of the present argument of the United States is based — I mean that idea set

Writers in United States who have opposed the claim.

forth in his letter, to which I shall hereafter pay some attention, written in September, 1888. My learned friend has entered the arena of public controversy in this matter; and, in Harper's Magazine for April 1891, he has published an article, very ingenious and able as you would expect, in which he amplified the idea first propounded in this letter of September, 1888. The article is, in fact, the argument which appears under my learned friend's signature in the printed documents before the Tribunal. But he was very speedily answered, and I have got here the answer written by a gentleman whose name was previously unknown to me, — Mr Robert Rayner.

Mr Phelps. — He was unknown to us equally.

Sir Charles Russell. — Well, I shall have a word to say about that presently. It was published at Salem, Massachusetts. We shall be able to give you a little later, I think, some account of who this gentleman is; but I am justified in referring to him for two reasons; first of all, because Her Majesty's Ambassador at Washington, Sir Julian Pauncefote, in sending it describes the writer as an eminent jurist,⁵ and Sir Julian Pauncefote is not a man who speaks in a hap-hazard way; but secondly, I will refer to this gentleman apart wholly from any additional weight to be derived from what his position or what his reputation may be, for the intrinsic merits of his answer : it is well worthy of consideration.

Mr Justice Harlan. — Is that the same article that appears in volume III of the British Case?

Sir Richard Webster. — No.

Sir Charles Russell. — That is another authority, to whom I shall refer later.

Mr Justice Harlan. — There is an article there signed, " Robert Rayner ".

Sir Charles Russell. — Well, that shows that the members of the Tribunal have been very industrious in reading this literature. I have not noticed it myself but my learned friend, who is very accurate, tells me that it is not the same. However, having called attention to this article, and adopting as my own argument some of the passages in it, I will place it at the disposition of any member of the Tribunal who desires to see it, and who will judge it upon its intrinsic merits.

Mr Phelps. — Can you give us a copy? I have never seen it.

Sir Charles Russell. — Well, it would have been courteous of the author to have sent you one, certainly.

General Foster. — Is it cited in your case?

Sir Charles Russell. — It is remarkable that none of your friends have called attention to it.

Mr Phelps. — I heard a man had written something; that is all.

Sir Richard Webster. — I may say that, at page 345, it is a reply to Mr. Felton.

Sir Charles Russell. — At page 12 of this article, the author puts Mr Phelps' argument, in the following way : — these seals, making

their home on American soil, belong to the proprietors and are a part of their property, and do not lose this quality by passing from one part of the territory to another in a regular and periodical migration necessary to their life, even though in making it they pass temporarily through water that is more than 3 miles from land. The simple question presented is whether the United States Government has a right to protect its property and the business of its people from this wanton and barbarous destruction by foreigners, which it has made criminal by Act of Congress; or whether the fact that it takes place upon waters that are claimed to be part of the open sea affords an immunity to the parties engaged in it, which the Government is bound to respect. It cannot be doubted that that is fairly stating the pith of my learned friend's contention.

The writer proceeds to answer it thus :

Mr Phelps thinks that to the "ordinary mind" this question would not be a difficult one.

Probably not because the falseness of premises upon which the alternative is based would escape detection by such a mind, — but any mind with a grain of logic sees at once that Mr Phelps is merely begging the real question; the primary one which must be settled in his favour before his proposition can be considered and that is : *Can we or any nation have any property whatever in seals or any wild animals found beyond the national territorial jurisdiction?* Of course Mr Phelps, a past-master in law, knows that in law there is no property right in wild animals whether fish, mammal, or bird outside of territorial limits; that anybody and everybody is free to appropriate or kill them so long as in doing this no right of territory is violated. To enable us to exercise lawfully any right of proprietorship in wild animals like seals we must confine them within our territorial jurisdiction. To allow them to leave our territory, to escape into the "high seas", is to deliver them up to the tender mercies of mankind in general, and to pretend to prevent non-Americans from doing what they like with seals found in the "high seas" is to fly in the face of all international law, and consequently to make ourselves ridiculous.

He then proceeds to argue in the remaining passages closely, with reference to authority, the legal proposition which is there indicated. Nor is this the only gentleman. Dr Stephen Berrien Stanton of the New York Bar, has written a book, which is published in New-York by Albert B. King, Publisher.

Mr Phelps. — Can you give us a copy of that?

Sir Charles Russell. — It is very distressing that I should be obliged to furnish this American literature to my friends, but I will with the greatest pleasure.

General Foster. — Is that cited in your case?

Sir Charles Russell. — I do not know, and, with great deference to Mr Foster, I do not care.

General Foster. — We might have searched for it if you had cited it.

Sir Charles Russell. — The first Edition was published in 1891. The second was published in 1892. This gentleman examines the question, and examines it from the only point of view in which up to the time of this litigation, if I may so call it, it was presented on the part of the executive authority of the United States : namely, as a question whether or not the United States had by right of sovereignty a right to apply its municipal

legislation to the eastern part of Behring Sea, and to base that right upon a derivative title from Russia. And when he comes to examine the question of those exclusive rights he arrives at the conclusion, which the Tribunal I think will not be surprised at, that it is impossible in view of the attitude of the United States itself in 1824, and in view of the attitude of Russia towards Great Britain as evidenced by the Treaty of 1825, to assert, or rather, I would say, to substantiate or to support, any claim to exclusive jurisdiction in any part of the Behring Sea. Then he goes on to argue the question from another standpoint. He deals with the plea which my friend Mr Phelps puts forward, and he argues strongly in favor of insisting on regulations dealing with this particular interest. I do not quarrel with his argument upon that point. I am not using it, nor is it *ad rem* to the point I am now upon — but I wish to state the full effect of it.

Mr Justice Harlan. — Does he not recommend prohibition with regard to pelagic sealing?

Sir Charles Russell. — I do not think he does. I do not think he says so in terms so far as I recollect.

Mr Justice Harlan. — That is my recollection. I have a copy of the book and I think he does.

Sir Charles Russell. — I will not be certain. I think what he does say, undoubtedly, is, that whatever is necessary to protect the fur-seals should be done, and very likely the inclination of his opinion is in the direction indicated by the learned Arbitrator. Of that I am not at all sure, but the point he makes is, I think, that as a matter of legal right what should be done cannot be done upon the sole authority of one nation. But, as I say, I am not citing it in that connection for the moment.

Next, there is the article in a magazine called the “ Forum ” by Professor James Angell : published in November, 1889.

General Foster. — He is an American citizen whose name we have heard before. He is a gentleman of eminence, and President of the University of Michigan.

Sir Charles Russell. — I am very glad to have had that high testimony in his favor.

General Foster. — But he is not a lawyer.

Mr Justice Harlan. — He is the same gentleman who was on the Commission relating to the Fisheries on the Newfoundland coast.

Sir Charles Russell. — In the beginning of his article, which is on page 92 of the first volume of the Appendix to the Case of Great Britain, he says : —

Alaska is now furnishing us with two international questions of some interest and consequence. The first concerns our right (freely exercised of late under orders of our Treasury Department) to seize foreign vessels engaged in catching fur-bearing seals in Behring Sea, many miles away from land, and to send them into port for condemnation and forfeiture.

Mr Phelps. — Will you kindly give the date of the article.

Sir Charles Russell. — November 1889. Then he says :

The second concerns the determination of the boundary between Alaska and British America.

The President and the other members of the Tribunal will appreciate what that means. You recollect, Sir, that the southern portion of what is now called “ Alaska ” merely consists of a strip, or *lisière*, of the land along the coast, running in front of the British territory. The question of the actual boundary was left more or less in doubt according to the somewhat vague terms of the Treaty of 1825. That is not at all in question in this case, and I merely mention it to explain the second question that he here refers to. Then Mr Angell proceeds in this article to show what will be found to have a much wider importance than at first sight may appear, that so far back as 1881, Mr French, the acting Secretary of the Treasury, writing on the 12th March in that year says :

All the waters within that boundary to the Western end of the Aleutian Archipelago and chain of islands are considered as comprised within [the] waters of Alaska Territory. All the penalties prescribed by law against the killing of fur-bearing animals would therefore attach against any violation of law within the limits before described.

That is territorial jurisdiction, carrying with it the right of legislation as for territory. Then, after stating the legislation upon the subject, he proceeds to say, on page 93 :

The question is whether for this laudable purpose of preserving the fur-bearing seals from extinction, and maintaining our undisputed right to control the taking of these animals on the Pribilof Islands, we may rightfully board, search, and seize foreign vessels in Behring Sea more than 3 miles away from land.

The equal right of all nations to use the high seas for any lawful purpose of commerce, navigation, fishing, or hunting is now so universally recognized; the United States have been so constantly the strong defender of this right; we have so vigorously opposed all attempts of Great Britain to search our vessels in time of peace; we have claimed so vehemently the right of fishing in Canadian waters sharply up to 3-mile line from shore, that obviously we must show some very plain and cogent reasons to justify our course in Behring Sea. What reasons have been or can be given?

Our Government has given, so far as is known, no other formal statement than that of Acting Secretary French (above quoted in part) to inform either our citizens or foreign Powers of the precise grounds on which the seizure of British sealers is to be justified. No defence of our action by Secretary Bayard, nor up to the time of this writing, by Secretary Blaine, or Secretary Windom, has been published.

But in our own newspapers editorial writers or contributors have suggested lines of defence of our action. The ground that they have generally taken as the strongest is that Russia exercised exclusive jurisdiction in Behring Sea, and that by the cession of Alaska she transferred to us the right to exercise the same jurisdiction.

Then he proceeds to discuss that question, and he arrives at the conclusion that the Treaties will not support the claim to any exclusive jurisdiction in Behring Sea. He further cites a passage from Governor Boutwell, the Secretary of the Treasury in 1872 in which he said :

I do not see that the United States would have the jurisdiction or power to drive off parties going up there for that purpose, unless they made such an attempt within a marine league of the shore.

I ought to say in passing that my friends say that Mr Boutwell's letter had reference to something outside Behring Sea, outside the Aleutians, and therefore that it has not the significance which otherwise might have been attached to it. It is not very important to consider that one way or the other. Then on page 95 he proceeds to consider an argument as regards the seal fishing on the Asiatic coast :

No doubt, the condition of the Siberians on that coast would present a strong case for generous action on the part of foreigners in abstaining from interference with their means of gaining a livelihood. By common consent, out of regard to the hardships of their life, fishermen are not disturbed in their pursuits in time of war. But can the Russian argument, even if it has validity for the Siberians, be used by us? We have without any scruple, for half a century, taken whales in the seas adjacent to them. We can hardly assert with much plausibility that the members of the Alaska Commercial Company, which has the monopoly of seal catching in and near the Pribilof Islands, can plead *in formâ pauperis* for protection on grounds of charity.

It may be argued that since most of the seals which are taken by the British breed on our soil in the Pribilof Islands, we have an exclusive claim to them in the sea, or at any rate a right to protect them there from extinction. But some of them breed on Copper Island and Behring Island, both of which belong to Russia. How is it possible to maintain any claim to ownership in seals on the high seas under any principle of law applicable to wild animals? We can acquire no property rights in animals *feræ naturæ* from their birth on our soil, except for the time that we hold them in our possession. A claim by Canada to the wild ducks hatched in her territory, after the birds have passed her boundary, would seem to be just as valid as ours to seals in the open sea.

I recall only one case which seems to furnish any analogy for the claim that we may regulate seal fishing in the open waters of Behring Sea. The British Government does regulate and control the pearl fisheries in the open sea from 8 to 20 miles west of the northern end of Ceylon. But it is to be presumed that this is done under sufferance of other Powers; because they have had no interest in interfering with the pursuit of the pearl divers. Should they claim the right to seek pearls in those waters, it is not easy to see how Great Britain could oppose any argument, except that of long acquiescence by them, in her exclusive possession of the pearl grounds; and it is questionable whether that argument would have much weight.

It may be said that if we have no right to exclude other nations from taking seals in the open waters of Behring Sea, and if the law and the Treasury Regulations as they now stand can be enforced against our own citizens in those same open waters, we are clearly discriminating against our own countrymen. The foreigners may kill seals at times and in places forbidden to us. This is true. It is one of the anomalies and embarrassments of the present situation.

On the whole, we find no good ground on which we can claim as a right the exclusion of foreigners from the open waters of Behring Sea for the purpose of protecting the seals.

Then having discussed the question as a matter of right, he proceeds to suggest that it is a matter in which other Powers, Great Britain, Russia, Japan and so on, are interested, and that they should and ought to agree to measures for the preservation of the species : this of course is the position we have adopted.

Lastly, I will cite another American publicist, who is editor of a well-known book, which, I, myself, have frequent occasion to use professionally, and which has now reached the 6th. edition. It is an introduction to the study of International law by Theodore Dwight Woolsey — Woolsey's

International Law. The edition which is before me is by his son, and certainly he does not mince matters. I need not say that patriotism would suggest to him, if his conscience as a lawyer permitted him —

Mr Phelps. — He is not a lawyer.

Sir Charles Russell. — Well, if his conscience as a jurist permitted him, to say what he could; but after dealing in section 59 with the broad principle which lies at the root of this matter — that the high sea is free and open to all nations — that it cannot be the property or subject to the Empire of a particular State — that the things in it are free to all to take them, and so forth, with which I am not now troubling you — the editor adds this paragraph :

The recent controversy between Great Britain and the United States, involving the right of British subjects to catch seals in North Pacific waters, appears to be an attempted revival of these old claims to jurisdiction over broad stretches of sea. That an international agreement establishing a rational close season for the fur seal is wise and necessary, no one will dispute. But to prevent foreigners from sealing on the high sea, or within the Kamschatkan sea (which is not even enclosed by American territory, its west and north west shores being Russian) is as unwarranted as if England should warn fishermen of other nationalities off the Newfoundland banks.

I say it is creditable to the publicists of America that they should take this true juridical and legal view of the contention put forward by the United States.

Mr Justice Harlan. — Sir Charles, the Marquis Venosta asks me whether that passage was in the original book of Woolsey, or is it a passage added by his son ?

Sir Charles Russell. — I said that it was added by the present editor. The original author is dead.

The President. — What is the date of the edition ?

Sir Charles Russell. — 1892. It is the 6th edition.

Now, so far as I know, (I do not, of course, venture to speak on the matter with certainty) only one publication has appeared — I am not talking of newspaper articles and things of that kind, I am talking of persons who write under their own names with some sense of responsibility and with some knowledge of the legal considerations which affect the matter — the only publication which so far has appeared is one the publication of which in its present form, I am told, we owe to the suggestion of one of the Arbitrators, Judge Harlan — I do not know whether that is correct or not. It is an address delivered to the students by Mr James C. Welling of the Columbian University, professor of the International Law School of the University; and this book, like the others, is at the disposition of any member of the Tribunal who desires to see it.

I will only say, summarising the effect of it, that his whole argument as I have appreciated it, depends upon the correctness of an analogy which he draws between the case of bees and seals; and depends further upon whether he has or has not rightly appreciated certain well known autho-

rities upon the subject of bees; but I conceive (I am not to be deflected from my line of argument to justify myself at this moment) that he is mistaken in both respects. But his argument of course, is entitled to be treated with respect, and I am entitled to combat his view and the analogy upon which he bases that view when I come to the question of property. At present the Tribunal understands that I am calling attention to the fact that there is no body of respectable authority that I know of, legal or juridical, to support even at this moment and even in the heat of this controversy, the case which is put forward upon the part of the United States.

Now I have ended the discussion of these matters, which are more or less of a general character, and I end it with this one observation : My aim has been to reduce this question, so far as it is a matter of money interest, to something like what I conceive to be its just proportions.

Mr Justice Harlan. — Before you leave that, what is your statement about being indebted to me for that address?

Sir Charles Russell. — I do not know how it has reached me, but the statement was that the author had shewn you the paper and that you thought it was worth publication.

Mr Justice Harlan. — I never saw a line of the paper before its publication. I remember to have heard President Welling talk on the general subject, and suggested in reply to an inquiry by him as to the propriety of his expressing his opinions, that if he had matured views he could properly give them to the public in some form.

Sir Charles Russell. — I have no doubt that is the foundation for it. The only effect on my mind was that I read that with more care and discrimination, as you have seen.

Mr Justice Harlan. — He, like President Woolsey and President Angel, are Presidents of Universities in America. Although none of them are trained lawyers, they are gentlemen of wide reading, and stand very high.

Sir Charles Russell. — If I were to excise from the voluminous excerpts in the printed argument of my friends all who are not trained lawyers, the residuum would be very small.

Mr Justice Harlan. — I did not mean to suggest that you ought to do that, but simply to inform you who they were.

Sir Charles Russell. — Quite so, Sir. I was about to say that my object has been to reduce this question, so far as it is a matter of money interest, to something like its just and true proportions, and to dwell upon the novelty of the claim. And now my last word in this connection is to point out in a sentence, emphasizing what my friend Mr Carter so well said, how much more important the mode of determining this question is than the question itself. My last word in this connection is to point out the grave and far-reaching consequences of a decision which should affirm a property right in this dispute. My friends have said — I do not quarrel with it; they are probably right — that a mere ordinary right of defence of property such as the law recognizes, and such as I shall

hereafter explain, would be inadequate for the purposes of the protection of the fur-seal in the Behring Sea. I am willing to accept, without argument, their statement for this purpose as correct. They claim that the mere right of defence of possession would be inadequate. They say to give them the effective right of protection, they must have a right of search; they must have a right of seizure; they must have a right of confiscation; and I need not point out that such rights must have not merely a direct effect in interfering with the rights of other nations on the high seas, but must have a direct and serious effect in harassing and interfering with the commerce of the world, which has nothing to do with the question of pelagic sealing at all.

I say, therefore, that this question does involve gravely, does involve directly, the freedom of the seas and the equality of all nations, be they great or small, upon the seas.

Now, Mr President, I proceed to state the order of the argument which I am about to present. I shall, first, consider the facts and circumstances of the seizures of British vessels under the executive authority of the United States'

Order of the argument
set forth.

Government; for it must not be forgotten, what I took the liberty a good many days ago now of reminding the Tribunal of that the Government of the Queen here is a party complaining that the property of the subjects of Great Britain has been, without legal warrant, seized and confiscated, and some of the crews of those vessels fined and imprisoned, also without legal warrant. It is part of your duty to find the facts in relation to those seizures, though it is not part of your duty to assess the claims for damages in respect to them. I shall then pass to the consideration of the first four questions, grouping them together, in article VI of the Treaty, the question which we have called the question of derivative right under Russia. I shall then consider question 5, to which the great stress of the argument of my learned friend has been directed; and, following upon that examination I shall, asking for the patience of this Tribunal, examine the cases that have been cited and the propositions that have been based on those cases. And, finally, I shall examine the analogies sought to be drawn from the legislation of other Nations as affording some foundation for the contentions advanced on the part of my learned friend Mr Carter; especially I shall examine the argument that in the analogy of that legislation of other civilised countries is to be found some warrant for the suggestion that international law sanctions such claims as are here advanced.

THE SEIZURES OF THE BRITISH VESSELS

I begin, at once, with the question of the seizures.

The President. — You spoke yesterday, Sir Charles, of introducing into the general plan of your argument the two different questions of damages: those with reference to the seizure, and those under the *modus*

vivendi. At which moment of your argument do you intend to bring those questions of damages in?

Sir Charles Russell. — At the conclusion of all questions of principle.

The President. — In the first part of your argument, before you enter upon the Regulations?

Sir Charles Russell. — Certainly.

I was about to draw, as it is right I should, the attention of the Tribunal to what its function is under Article VIII. Under Article VIII, it is provided that

The High Contracting Parties having found themselves unable to agree upon a reference which shall include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it; and, being solicitous that this subordinate question should not interrupt or longer delay the submission and determination of the main questions, do agree that either may submit to the Arbitrators any question of fact involved in said claims, and ask for a finding thereon, the question of the liability of either Government upon the facts found to be the subject of further negotiation.

I should like the attention of my learned friends at this point for one moment. We, I think, agree (it is so stated, I think, in both Cases) that that does not involve the calling upon this Tribunal to deal with any question of amount?

Mr Phelps. — It does not.

Sir Charles Russell. — No. We agree, therefore, that this Tribunal will not be troubled to assess, as the technical phrase is, the amount of damages. What the Tribunal will be asked to do is to find any question of fact involved in the said claim; and, so far as we are concerned, the simple facts that we request the Tribunal to find will be these. Two of them are undisputed; — first, the fact of the seizures; next, the fact that those seizures were made with the authority of the Executive of the United States, — neither of those facts is in dispute; and the only remaining one, therefore, which we shall ask the Tribunal to find is, that there was no warrant in law, in the circumstances of the case, for the seizure and condemnation of those ships, or the imprisonment of their crews.

Mr Phelps. — We should not regard that as a fact, as it seems to be a proposition of law.

Sir Charles Russell. — But it must be found as a fact, though I agree it involves a proposition of law.

Senator Morgan. — It fixes liability, does it not?

Mr Phelps. — Of course it does.

Senator Morgan. — I understand the Treaty does not permit us to fix liability upon either Government, and that would fix liability, would it not?

Sir Charles Russell. — Not necessarily; I agree it would go a very long way towards doing so.

The President. — I think, Sir Charles, you must make your distinction a little clearer.

Senator Morgan. — It seems to me it goes the whole length.

The President. — You must make it clear for us that it is not liability.

Sir Charles Russell. — Well, you are not to say, “We thereupon award and adjudge that the United States shall pay so much damages”. That would be the affirmation of liability; but you are asked to find the facts as to whether the seizures occurred, as to whether they were done with the authority of the United States, as to whether there was any justification in law for them. I do not see how you can escape it; and I think the passage which I am about to read shows that the view of my learned friends was the same. You will see at page 217 of the printed Argument of the United States, a sentence which makes the matter clear.

The claims submitted on the part of Great Britain are for damages sustained by certain of its subjects by reason of the seizure by the United States of certain vessels alleged to belong to such subjects, and warning certain British vessels engaged in sealing not to enter Bering Sea, and notifying certain other British vessels engaged in the capture of seals in Bering Sea to leave said sea, whereby it is insisted that the owners of such vessels sustained losses and damages, as set forth in the respective claims.

Now I call special attention to these next paragraphs :

The right and authority of the United States to protect the seal herd, which has its home in the Pribilof Islands, and in the exercise of such right to make reprisal of seal-skins wrongfully taken, and to seize, and, if necessary, forfeit the vessels and other property employed in such unlawful and destructive pursuit, is a necessary incident to the right asserted by the United States to an exclusive property interest in said seals and the industry established at the sealeries.

We, however, preface what we have to submit on this feature of the case by saying that, if it shall be held by this tribunal that these seizures and interferences with British vessels were wrong and unjustifiable under the laws and principles applicable thereto, then it would not be becoming in our nation to contest those claims, so far as they are just and within the fair amount of the damages actually sustained by British subjects.

I care not in what form it is put; but surely it is a question of fact, aye or no, were the Canadian vessels exercising a right when they were seized; aye or no, was there, in point of fact or of law, any justification for those seizures. I care not whether the result of those findings is or is not necessary to land the United States in liability. If it be so, so much the simpler the question of the settlement of those claims; but it could not have been intended, it would have been an absurdity to suggest that this Tribunal was merely to find the fact that the vessels were seized, and merely to find the fact, which no one has ever disputed, that those seizures took place under the executive authority of the United States. It would be idle to suggest that this Tribunal was called upon merely to determine those facts about which there is no controversy; and it will be observed that the language to which I have called attention in Article VIII

appears to give a right to either of these parties, the United States on the one hand Great Britain on the other, to call upon the Tribunal to find any questions of fact involved in the said claims.

I cannot see any question of fact more directly involved in this claim than the question what these Canadian vessels were engaged in when they were seized, or when they were interfered with — whether they were exercising a right, whether they were committing a wrong, whether the United States had the warrant of law, or whether it was a lawless interference and lawless arrest.

Mr Phelps. — Perhaps I may suggest to my learned friend one very serious question of fact as it seems to me, as to whether some of these vessels were the property of British subjects at all.

Sir Charles Russell. — I am exceedingly obliged to my learned friend for that illustration. It would be a question of fact which might or might not be submitted to this Tribunal; we do not seek to disturb or embarrass the Tribunal; if there be any real dispute of that kind, we are quite willing to leave it entirely an open question.

The President. — That question will perhaps be rather raised by you Mr Phelps than by the other side.

Mr Phelps. — It has been raised in our argument. We do not care to discuss it if the Counsel on the other side do not. It is a fact they may or may not ask the Tribunal to decide. If they do, we dispute it. If they do not we have nothing to say.

Sir Charles Russell. — I am obliged to my learned friend for his interposition, because I think it throws some light upon the matter. The finding that the vessels, the names of which appear in the case, have been seized and seized while exercising a legal right would not conclude the liability of the United States to pay if, for instance, it turned out that some of those vessels were owned by citizens of the United States and subject to the laws of the United States.

Lord Hannen. — Would not that be one of the facts which we might be properly called upon to determine?

Sir Charles Russell. — Undoubtedly, my Lord; I have said so; it might be; but it is a fact that as far as I know at present — I have not referred to Mr Tupper, the Canadian Agent, to have his view in the matter — but so far I have no reason to suppose that that is a matter that we should care to press this Tribunal to embarrass itself with at all; but I shall answer that question at a later stage. For the present, I am content to say that the questions of fact which I submit the Tribunal ought to find are these — the fact of the seizures, which is not disputed: the fact that those seizures were made with the authority of the United States Government: and the fact that the vessels so seized were exercising a right upon the high seas: and finally, the fact, in any form in which it is desired to be couched, — I care not what — that there was no warrant in law on the part of the United States for those seizures. I beg to say that the view which I am now presenting is the view presented in the passage from the United

States Argument to which I have already drawn your attention, and which is also in the United States Counter Case.

Lord Hannen. — Does not your contention amount to this, that the question of the liability referred to in the 8th Article means the question of the amount of liability?

Sir Charles Russell. — Well, that is one view, but I confess I think the word is more general. I confess the word “liability” is not narrowed, I must say, to the question of amount merely. I think the word “liability” has a wider significance.

Lord Hannen. — Would not your contention limit it to that sense? You say we are confined to whether it was done wrongfully.

Sir Charles Russell. — Certainly, the fact you are required to find must carry with it the consequence that the seizures were wrongful.

Mr Justice Harlan. — Is it the fact that they did or did not do it in violation of the law? — is that a fact?

Sir Charles Russell. — I think it is.

The President. — Well, I think we will let you argue your point; but this Tribunal must reserve for further consideration whether they will or not take it as a fact.

Sir Charles Russell. — I will also respectfully reserve to myself the right of supporting my views, because, knowing what was to be found in the Counter-Case of the United States, I really did not anticipate that there would be any difference between us on this point. It is the first time that it has been suggested to me.

Now I want to call attention to page 133 of the Counter-Case in this connection. I merely refer to it to show that they discuss the questions referred to by my learned friend, Mr Phelps, suggesting that some of these vessels are not British-owned vessels, and they take the point which my learned friend Mr Coudert reiterated the other day, that no damages can be awarded for prospective profits, on the ground that they were too remote. My learned friends made the argument under a misapprehension, I think, of the Geneva decision; and then upon page 134 they insist that the damages claimed are excessive; and then comes the final passage, to which I especially desire to call attention.

The United States do not deem it necessary to state in detail wherein the valuations and damages claimed are excessive and exaggerated, or submit proofs in relation thereto, further than by the analysis of said claims found in the Appendix to this their Counter Case, at page 339, for the reason—

Now this is their reason. —

That the “questions of fact involved in the claim” of either of the parties to the Treaty against the other, to be submitted to the Tribunal of Arbitration under the provisions of Article VIII, should, as this Article is understood by the United States, have relation only to such facts as tend to fix the liability of one party to the other, and do not include facts which relate to the amounts of such claims.

Mr Phelps. — Certainly.

Sir Charles Russell. — Showing that the United States took the view

that Lord Hannen has been good enough to express as to what was the limitation of this matter.

The President. — If it is more convenient for you to proceed with your argument, it is understood that the Tribunal reserves for further consideration the question which has been mooted.

Lord Hannen. — If I may put this question to you, Mr Phelps; it would assist my understanding, at least, of the point in difference between you, if you could with propriety answer this question: Do you consider that we finding the facts, the United States would in the future negotiations which would take place as to liability be bound by our decision of principle upon the first four questions, or would it still be open to them to say, upon the facts found, we still maintain that we are not liable to pay damages for any seizure?

Mr Phelps. — That is a question, my Lord, that I am not prepared at this moment, to express an opinion upon.

Lord Hannen. — Very well, perhaps you will consider it.

Mr Phelps. — I may say that our view of article VIII has been simply this: that any facts which either party requested the Tribunal to find and establish by proof, bearing upon the question of claim for these seizures, would be passed upon and found as might be right by the Tribunal; and thus the whole subject of the liability of the Government of the United States or of Great Britain to pay any amount, whether found by the Tribunal or not, in respect of those facts, would be left an open question. The material facts as to the seizure of these vessels would seem to me to be these: What vessels were seized? Did they belong to British subjects? Where were they seized? Was any claim made as a ground for seizure, except that they were engaged in the taking of seals? Such facts as that, from which, when found, might be deduced well enough the answer to the question whether upon those facts the United States ought to pay or not.

Lord Hannen. — Well, that is the whole question over again, and all this Arbitration would go for nothing.

Mr Phelps. — Not necessarily.

Mr Justice Harlan. — Suppose this Tribunal should decide under the points in Article VI, that the United States had or had not any right of property in the seals, and had or had not a right to protect them on the high seas, you would consider the United States bound by that ruling when the two nations, if the occasion arose, got together in negotiations on the question of damages.

Mr Phelps. — I should, Sir, if you put that question to me at this time.

Mr Justice Harlan. — That is what I understand Lord Hannen's question to embrace.

Mr Phelps. — If that is the purport of the enquiry, Yes. I do not suppose for instance that if this Tribunal should decide that the United States had no right of property, and no right of protection, and that under the circumstances vessels were seized belonging to British subjects, I do

not understand that it would be open to the United States after that to insist that there was a right of seizure, and a right of protection, in the face of the decision of the Tribunal.

Lord Hannen. — I am bound to say that, assuming that that may be taken as *authoritative*, it would meet my question.

The President. — And in that case the liability spoken of in Article VIII would merely refer to the question of indemnity, and then there would be no disagreement.

Mr Phelps. — That question, as it seems to me, which was put by his Lordship refers rather to the inference that the United States Government would feel itself bound to draw in respect of the seizure from the decision of the points of law in respect to the other branches of the case.

Lord Hannen. — Yes. The object of my enquiry would be completely met if it can be taken as authoritative. We will assume for a moment that the finding would be no property. If that can be tacked on to the finding of facts as to the seizure, then that would meet that which Sir Charles has been asking for, a finding that it was an illegal seizure; and, if so, I presume that would satisfy his requirement, as undoubtedly it would meet the view which I intended to indicate in the question I put to you.

Mr Phelps. — Your Lordship will see that if you ask the opinion of the Counsel of the United States what would be the just and right course for the United States' Government to pursue in the future negotiations if such were the finding of the Tribunal, our answer might be one way. If you ask us if we are authorised here to bind the United States to any conclusion in future negotiations, we must answer that we have no such authority and have no right to make a declaration that would bind them.

Lord Hannen. — That is why I put in the word « *authoritative* ».

Mr. Phelps. — We are not authorized to make any such statement, or to give any such assurance. I am free to say, and I believe that to be the view of my associates, that after a finding by the Tribunal upon the five questions involved, it would not seem to me becoming on the part of the United States, who have agreed to abide by this award, to contradict the award when the question of its propriety arose upon this subordinate matter of seizure; but it must be a question for those who control the diplomatic relations of our Government, and is not a question that we are authorised in reference to.

The President. — That is all very well Mr Phelps; but we have here the United States before us in the persons of their Agent and Counsel, and we have the right to ask them what is the authoritative and official interpretation put by the United States upon one word used in an article of a Treaty which limits our powers. We have the right to ask you what is the interpretation put by the United States upon those words « *question of liability* »?

Mr Phelps. — That question the Tribunal is quite entitled to put, and that question we are quite ready to answer. We have endeavoured to answer it; — that in the discussion of questions under article VIII the Tribunal is invested with no authority whatever except to find the facts, leaving the legal consequences of those facts, so far as these seizures are concerned for future consideration.

Then if the Tribunal goes further, and asks me what that future consideration on the part of the United States Government would be, I reply in the first place that I have no doubt that it ought to regard the decision of the Tribunal as conclusive upon the questions arising under this Treaty, but that I am not authorized to go beyond this arbitration and the power with which the Tribunal is invested under this article, and give an authoritative assurance as to what those in charge of the United States Government when that time comes may do. The distinction may be a refined one, but it is one that we feel compelled to make.

The President. — We understand that very well. We merely wanted to know what was your interpretation of these words “ questions of liability ”. We know the interpretation of the English Government.

Mr Phelps. — Our interpretation of that is, as I have said, that article VIII simply provides for the finding of such facts — material facts of course — as either party may desire to have found and may offer sufficient evidence in support of. What consequences shall come from that finding is a point that it seems to us is not submitted to this Tribunal. It will be for the after consideration of the Government. But I should not seriously doubt, when you ask my opinion, when those points come to be considered hereafter by the United States Government, that the decision of the Tribunal upon the first five questions will be respected there as elsewhere.

The President. — I think there is no objection to Sir Charles arguing the question of fact, as he understands it. The court will consider whether it is one of those facts which we have to decide upon.

Mr Phelps. — General Foster has put in my hands a paragraph in one of the letters of Sir Julian Pauncefote to Mr Wharton in the course of the negotiation, dated August 26, 1891, while they were discussing this eighth clause. It is on page 330 of the first volume of the Appendix to the United States Case.

He says :

My Government are unable to accept the form of clause proposed by the President because it appears to them, taken in connection with your note of the 23d ultimo, to imply an admission on their part of a doctrine respecting the liability of Governments for the acts of their nationals or others persons sailing under their flag on the high seas which is not warranted by international law and to which they cannot subscribe.

I need hardly say that the discussion of such a point (which, after all, may never arise) must prolong the negotiations indefinitely. Moreover, it seems premature to enter into such a discussion before the other questions to be submitted to the Arbitrators have been determined and all the facts on which any liability can arise have been ascertained.

I will read a little further down, with the permission of the Court. Sir Julian's suggestion of the form of this article shows what was in the mind of the British Government. On the same page and further down in the same letter he proposes this clause :

Either of the two Governments may submit to the Arbitrators any question of fact which it may wish to put before them in reference to the claims for compensation which it believes itself or its nationals to possess against the other.

The question whether or not, and to what extent, those facts, as determined by the Arbitrators and taken in connection with their decision upon the other questions submitted to them, render such claims valid according to the principles of international law shall be a matter of subsequent negotiations, and may, if the two powers agree, be referred, in whole or in part, to the Arbitrators.

Sir Julian Says : I do not propose the above wording as definite; it should be open to amendment on either side; but if after submitting ", etc.

The remainder is not material.

That shows that the idea of the British Government as expressed by Sir Julian Pauncefote then was precisely what I have endeavoured to state as our idea now, and I think there is nothing in the correspondence that will show that that idea was changed or that the language of the Treaty was modified so as to prevent any different meaning from what was there expressed. That is to say, that so far as the seizures are concerned the arbitrators simply find the facts, leaving the whole subject then for future negotiation; and therefore, charged as we are, authorized as we are, only with the representation of the Government before this Tribunal upon the points submitted by the Treaty, we are not authorized without communicating with our Government to go any further than that by giving an assurance about further negotiations. At the same time, as I have said, I should not hesitate to express my opinion as to what the result of the finding would probably be on the action of those who represent our Government.

Lord Hannen. — You will observe, Mr Phelps, that Sir Julian Pauncefote uses an expression the equivalent of one which I have used. He says : " Findings of fact are to be taken in connection with the determination of the Tribunal upon questions of principle ". I used the expression : If they were to be one tacked on to the other that would be sufficient, supposing it were an authoritative statement.

Mr Phelps. — That expression, however, your Lordship, is just the one which was left out of that article when it was put into the treaty.

Senator Morgan. — Sir Charles, before you proceed I would like to say this : The President of the United States can pledge his Government diplomatically to entertain or enter into a future negotiation. I have no doubt of that; but neither the President nor any of his agents can pledge the Government to any particular result of a future negotiation, for the reason that another body has to come in and, by a two-thirds vote, ratify and confirm any negotiation before it can become any part of the supreme law. Therefore the counsel here, though they might be expressly authorized by the President to make pledges to this Tribunal, could not pos-

sibly commit the American Government, under its Constitution, by agreeing that a pledge should be executed in the form which they might state. It is a peculiarity of our Government that prevents that result.

Sir Charles Russell. — I am quite aware that according to the Constitution of the United States the Executive Government could not enter into a Treaty without the authority and sanction of the Senate.

But, Mr President, I think we are indebted to Mr Phelps for his interposition and for his citation from this letter of Sir Julian Pauncefote, because it explains the meaning of the word “ liability ” as it is used in that paragraph, and it will be found to have no relation whatever, for the reason I will give you in a moment, to the question of the liability of the United States, if in point of fact the seizures were unauthorized.

You will observe that article VIII deals with claims which may be made, either on the part of the United States or its citizens, or on the part of Great Britain and its citizens. You will observe the distinction at once between the two sets of claims. Once it is clear that the acts which are complained of are done with the authority of the Executive of the United States, it becomes the direct act of the United States : there can be no question of the liability of the Government for those acts, if the acts themselves cannot be justified ; but, *per contra*, the United States were suggesting that they on behalf of themselves and their citizens might make claims against the British Government in respect of acts done by individual merchant vessels belonging to subjects of Great Britain — not public vessels belonging to the Executive, and not in any way authorized by the Executive. The question raised therefore was whether or not the British Government would be liable for the acts of private citizens in the pursuit of pelagic sealing. Sir Julian Pauncefote says :

We cannot admit as a principle of international law that a Government is responsible for what is done by a merchant ship that is bearing its flag, unless that Government has done something to adopt its act or taken the responsibility upon itself.

Therefore he says, *quoad* the claim for damages against the Government of Great Britain I am not prepared to admit that, even if it were found that the merchant vessel had done something to the interest of the United States or its citizens, which was without warrant of law, I am not prepared to admit as a principle of international law that my Government is *ipso facto* liable. That is a perfectly intelligible distinction ; but it has no relation, no bearing, upon the other branch of liability, namely, the liability of the United States for the acts done under the direct authority of its executive power. I think the distinction is now apparent ; and I confess upon reflection that I think that Lord Hannen was right in saying that as regards the word “ liability ”, so far as it concerns claims of Great Britain, it can not in this connection mean anything except the amount of liability.

Lord Hannen. — I did not intend to express a definite opinion.

Sir Charles Russell. — No, no, my Lord ; I so understood. In truth

when one comes to look carefully at the matter, and my friends are very candid, and I am sure will approach it in a candid spirit, how does the matter in fact stand? They have, *a priori*, in setting out the questions in article V, set out the grounds upon which they justify what they did. “ We did what we did because we had rights under our title from Russia to do it — We did what we did by reason of our own inherent rights as owners of territory, and as owners of certain alleged rights incident to territory. ”

That is their justification for the seizures, and if that justification fails, my learned friends must candidly admit that there is no other justification. I do not care the least about the form of the thing. I want to get at the substance. And if it is clear to the mind of the Tribunal that the two questions hang together, in the sense that if the questions of right are decided adversely to the United States, then there can be no justification for the seizures and there must be consequent liability for the seizures, I care not in what form of mere words that result is arrived at.

But let me finally say that this matter really is concluded from the point of view of the United States by what they themselves have said. What is the meaning of what Mr Foster says in his very carefully prepared Counter-Case on behalf of the United States? He can only mean one thing when he says at the bottom of page 134 :

The United States do not deem it necessary to state in detail wherein the valuations and damages claimed are excessive and exaggerated, or submit proofs in relation thereto, further than by the analysis of said claims found in the Appendix... for the reason that the “ questions of fact involved in the claim ” of either of the parties to the Treaty against the other, to be submitted to the Tribunal of Arbitration under the provisions of Article VIII, should as this article is understood by the United States, have relation only to such facts as to tend to fix the liability of one party to the other, and do not include facts which only relate to the amounts of such claims.

Mr Justice Harlan. — Do you understand that to be an admission that we are to find not only such facts, but also on the question of legal responsibility arising out of those facts?

Sir Charles Russell. — These are largely mixed questions of fact and law. I think the true meaning — as the Judge is good enough to ask me the question, and I think he is entitled to a direct answer — I think the true meaning of Article VIII is simply this : That this Tribunal is not to have authority to award judgment in damages against the United States; that it is not to have authority to order the United States to pay any sum, much less to fix any sum; but that it has the authority and obligation to find the facts, whether they are partly law or partly fact. Let me point out that it is quite a mistake to suppose that this international Tribunal in affirming propositions of law is affirming propositions of law in the same sense in which a municipal Tribunal would affirm them. Foreign law is a question of fact. If Mr Justice Harlan, sitting in his Supreme Court in Washington had to determine a question of English law, he would have to determine that, not as a question of law, but as a ques-

tion of fact. So as regards any other law which is foreign to the Tribunal before which it comes in question; and as regards our view of this matter it will be found that municipal law has a very important part to play in the consideration of this question.

Mr Justice Harlan. — May I ask you again, that I may get your exact idea — Suppose in reference to a particular vessel we should find that it was seized at a particular time and at a particular place, having previously found, let me assume for the purposes of the question, that the United States has no property in the seals and no right of protection. Do you insist that we should further find as a fact in the case that the seizures were wrong?

Sir Charles Russell. — If no other justification was shown I should say, Yes.

Mr Justice Harlan. — What then is left for future negotiation?

Sir Charles Russell. — The question of amount.

Mr Justice Harlan. — Only of amount?

Sir Charles Russell. — The question of amount, and a little more than amount : a question of amount, speaking of the matter in gross; a question of liability as regards items of that amount, as for instance the question of whether the claimants put forward are entitled to claim — whether they are United States citizens. Again, the question of the principle upon which the claim is to be assessed, the question raised by my friend Mr Coudert as to prospective loss from the non-employment of the vessels, and questions of that kind — every question short of the affirmation of a judgment to pay is what the Tribunal is called upon as against the United States to affirm under Article VIII. That is my contention.

Mr Gram. — Will you allow me to ask you a question. Was the insertion of this final sentence which commences with the words, “ The question of liability of the Government ”, etc., due to the observations of Sir Julian Pauncefote in his note cited at page 330?

Sir Charles Russell. — My impression is, sir, as far as I can form a judgment, that it probably was in consequence of that statement of Sir Julian Pauncefote; and I have endeavored to explain how in connection with the claim against Great Britain, that word would be very properly used.

The President. — So that we would have to find on no question of fact except as to the amount of the liability?

Sir Charles Russell. — Practically, in my judgment, it comes to that.

The President. — And that is the way in which you ask us to construe the article.

Sir Charles Russell. — I am not calling upon you to say that in express terms; but I say that it practically comes to that.

The President. — And that is the same interpretation you put upon the passage you just read from the United States Counter Case?

Sir Charles Russell. — Certainly. I think there is no other interpretation that can be put upon it. I will endeavor to formulate in precise language, and put in writing, so that they may be quite under the eye and clearly within the cognizance of the Tribunal, the findings that we should ask you to make. I should have thought that my learned friends and myself, — if they had authority corresponding to the authority that I as a law officer of the Crown have a right to exercise — I should have thought that we could together have determined that as regards these questions of whether the ships were American ships, the circumstances under which they were seized, the places, etc., they are matters with which this Tribunal ought not to be troubled. We are asking this Tribunal to affirm great principles, not to go into these details; and I should have hoped that before this discussion has closed, communication will have been made, if necessary, with the executive of the United States, in order that this matter may be removed from the area of controversy. There ought to be no real dispute between us on this matter.

Senator Morgan. — The Executive cannot remove it.

Sir Charles Russell. — I do not, with great deference, think that it is a question with which the intervention of the Senate would be called for.

Senator Morgan. — The Senate would have to affirm any new negotiation.

Sir Charles Russell. — No, it is a question of executive action under an existing Treaty.

Mr Phelps. — We shall be very willing to confer with our learned friends in regard to any questions of fact upon which we can agree, in respect to these matters. Undoubtedly many questions of fact that they may desire to have found we can agree upon; and if we can, we shall be glad to save them and the Tribunal any further trouble.

Mr Justice Harlan. — Still, we have upon us the responsibility to make a finding as to those facts.

Mr Phelps. — Certainly.

The President. — And upon those facts which shall be submitted to us.

Mr Phelps. — But upon another class of facts we are not likely to agree.

Senator Morgan. — I will say for myself that I do not feel at liberty to make a finding upon any state of facts that has not been regularly submitted to this Tribunal under that Treaty. It says "Questions shall be submitted". That means that they shall be submitted in proper form and at the proper time.

Mr Phelps. — I quite agree that the finding must be by the Tribunal. What I meant to say was that I am prepared to say to the Tribunal that we have nothing in opposition to certain facts which we are not prepared to dispute.

The Tribunal here adjourned for a short while.

Sir Charles Russell. — I will not pursue the discussion upon the

construction of article VIII at this moment, but will content myself with saying in relation to it that we think it will assist the Tribunal if we formulate in a written paper the findings which, according to our construction of the Treaty, are findings within the meaning of article VIII, and which the Tribunal should be called upon to affirm. I will take the opportunity of saying that these statements of fact shall be submitted to my learned friend on the other side, so that when he comes to reply we may have his expression, probably of assent, or it may be in part of criticism, of those statements.

I now proceed to the consideration of the facts relating to the seizures themselves; and it will be convenient if I state briefly The facts of the seizures. to the Tribunal the order of argument that I intend to pursue. I intend to bring before the Tribunal, without any colour, the facts of the seizures and the circumstances which followed them in the order of events. I shall not feel called upon to make much comment in relation to them. I shall then proceed to call the attention of the Tribunal to the diplomatic correspondence, beginning with the protests always persevered in by the British Government, following the seizures when they occurred, and examining the grounds which were put forward by the United States in supposed justification of those seizures. I shall then examine, for an important purpose, the legislation of the United States which became the basis of the judicial proceedings in the Courts in which confiscation of the seized vessels was sought; and lastly I shall examine the judgments of the judges who determined the confiscations.

My objects in doing this are to establish, first, that those seizures were unwarranted in point of law; to establish, next, that the executive action of the United States was based, and based solely, upon their municipal legislation, and upon the ground that the seizures took place where there was territorial dominion of the United States justifying the application of their municipal legislation to that locality: and that nowhere is there to be found any suggestion of the contention now put forward, that those proceedings were really justifiable not under the municipal legislation at all, but were justifiable and can be defended upon the ground that it was merely an invocation of the inherent right to protection which every State has the right to invoke for the protection of its property. Next, and particularly in connection with the proposition last mentioned, I propose to show, that this legislation cannot be treated as being in the nature of executive protective regulations, because it is legislation which is expressly confined, and has been judicially held to be confined, to a definite and defined area, namely the eastern part of Behring Sea; and that that consideration makes it impossible to treat that legislation as a protective executive act, because the right of protection, if it is a right, of defence of possession, of protection of property, is a right which follows that property wherever it is, and cannot be defined or controlled within defined limits. It will be found later, if it should seem to the Tribunal that in

this connection I am somewhat elaborating the point, that this will have a most important bearing upon the area of the dispute between the United States and Great Britain referred to this Tribunal; and a most important bearing also upon what is the limit and extent of the jurisdiction of this Tribunal both as to questions of alleged right and as to questions of regulations.

With that statement I proceed to the facts. I have in preparing my notes for this purpose endeavored to see to which of the many printed documents I could refer with the least inconvenience to the Tribunal; and I find that with hardly an exception all the documents to which I shall have to refer are to be found in the large volume, Volume III of the Appendix to the Case of Great Britain.

It will be found that very frequent references will not be required to the text, because I intend to state the facts in a narrative form, as they do not appear in that volume according to the order of date. The earlier part of my statement will be found on pages 61 and 62, and a little later on pages 22 and 23. Later still it will be found at page 40. Then we have to pass on to pages 334 and 335. There is then a passing reference to the Appendix at page 209. But within those pages practically will be found all to which I am going to refer.

These are the facts, and my friends will no doubt give them the attention they deserve; I think it will be found that I state them correctly.

The Canadian schooners, the "Thornton", "Onward" and "Carolina" were seized by the United States revenue steamer "Corwin" on the first of August 1886. They were towed to Unalaska. I do not stop to point out where they were seized, whether at 30, 40, 50 or 60 miles from the islands. I consider that unimportant because it is admitted that in each case they were seized far beyond the ordinary marginal belt of sea — the three mile limit. The crews of the "Thornton" and "Carolina", with the exception of one man and the captain on each vessel, who were detained at Unalaska, were sent by steamer to San Francisco. They were there turned adrift, while the men of the "Onward" were kept at Unalaska. The schooners and the seals found on board of them were also detained by the United States authorities. The master and mate of the "Thornton" were tried before Judge Dawson of the United States Court at Sitka on the 30th of August, 1886, and were sentenced, the captain, to a fine of \$500 and the mate \$300, and each was sentenced to be imprisoned for thirty days. In the next month, that is in September, 1886, the masters and mates of the "Carolina" and the "Onward" were condemned to undergo similar fines and similar imprisonment.

There is a painful incident in connection with the master of the "Carolina", who was an old man, and who appears to have been allowed temporary freedom and to have been found dead in some wood to which he wandered. I do not suggest that that was attributable to the direct action of the executive authorities. It is simply a lamentable event in connection with the story.

The other masters remaining were imprisoned for some time and finally were turned adrift, not furnished with funds, and left to find their way as best they could to their homes, some 1500 miles distant.

On the 21st of October, 1886, the formal protest of Great Britain was recorded; and on the 4th of February, 1887, the seizures having been made in August, of 1886, orders were given by the United States Executive to discontinue all pending proceedings, to discharge all the vessels, and to release all the persons who had been arrested in connection with the seizures.

This order was in due course communicated to the United States Marshall at Sitka, who chose, for some reason that I have never yet heard explained, to disregard it absolutely. He appears to have expressed the opinion that this executive order was a forgery. He declined to act upon it. He did not act upon it until a much later period; and it was not until August, 1888—I pray your attention to this—two years after the seizure of these vessels, that effective orders were given for their release; and by the time orders were given for the release of these vessels they were lying high and dry upon the beach where they had been left to rot, in so worthless a condition that it was not considered worth while to retake possession of them for the purpose of conveying them to some port for repair.

I make only one comment upon this story, and these indubitable facts—that I think it would have been almost better if my learned friend Mr Carter had foreborne making that commendation upon what he called the forbearance and statesman-like humanity which had characterized the Government and the Executive of the United States in this connection.

The vessels, the “ Anna Beck ” the “ W. P. Sayward ”, the “ Dolphin ”, the “ Grace ”, the “ Ada ”, and the “ Alfred Adams ”, were captured in July and August of 1887. The last mentioned of these, the “ Alfred Adams, ” escaped from capture. The others were taken to Unalaska. The officers and the crews were sent off to Sitka, taken before a Judge, and bound over for trial on the 22nd of August; and then, having been kept for trial until the 9th of September, they were unconditionally released. As regards the vessels, they were sold by auction by the United States Marshall on the 26th of March 1889, excepting the “ W. P. Sayward ”, in respect of which a bail bond had been given for her release. Whether that bail bond was paid or sued upon I do not know.

Mr Tupper. — No action was taken on it.

Mr Foster. — We suspended action on it.

Sir Charles Russell. — It is noticeable in respect of the vessels as to which the order for release was sent at the date I have given, that notwithstanding, after the great delay to which I have adverted, those vessels were released at the time when they proved to be worthless, the authorities sold the stores and other matters in connection with their equipment.

Now, what is the case which Great Britain has in point of law to establish in respect of these vessels? It is clear that all that Great Britain has to establish, to found its claim for damages for these vessels in the first instance, so as to make what is called a *prima facie* case, is the fact of the seizures: this is not denied; next, the fact that those seizures were made with the authority of the United States: this also, is not denied; and therefore, these vessels having been seized on the high sea, the *onus* lies upon those who seek to justify those seizures, to show that they were justified in making them. That state of the case, I am sure, will not be questioned — that once the fact of the seizure upon the high seas is established, and that that seizure was with authority of the United States Government, the *onus* thereupon lies upon the United States Government, in answer to the claim for damages in respect to what is *prima facie* a grievous wrong, the *onus* lies upon that Government to justify its action upon legal grounds. I will discuss those legal grounds presently.

Now I turn to the correspondence which took place, and I assure the Tribunal that I will not trouble them with Correspondence on the seizures. more than I can avoid. But it is my purpose, which I wish to make very clear to this Tribunal — though I wish to save them all the time and trouble that I can — it is my purpose that the statement I am now submitting shall cover the whole ground of this case, not perhaps perfectly or completely, but as far as I am able to do it; and I shall leave nothing unsaid which I think ought to be said in this connection, even if it should involve very considerable demands upon the patience of this Tribunal.

I have told you, Mr President, that the first seizures took place on the first of August, 1886. Information appears to have reached the Foreign Office in London, then presided over by the late Lord Iddesleigh, by the 21st of October of that year; and on page 20 is the first communication to which I need call your attention. It is the second communication on that page. It is addressed to Sir Lionel West, then the representative of Great Britain at Washington:

I have to request you to inform me whether the United States Government have replied to the communication which you were directed to make in my dispatch of the 9th ultimo, regarding the seizure of British vessels in Behring Sea by a United States Revenue cutter. If an answer has been received, I should be glad to receive a report of the substance by telegraph. I should be glad at the same time to know whether any appeal has been lodged against the decision of the United States Court condemning certain British subjects in connection with this matter.

Then at the bottom of that page is the further communication of the 30th of October, which is an important document. It begins —

Her Majesty's Government are still awaiting a report on the result of the application which you were directed by my dispatch of the 9th ultimo to make to the Government of the United States for information in regard to the reported seizure by the United States Revenue Cutter "Corwin" of three Canadian schooners while engaged in the pursuit of seals in Behring Sea.

I am inclined to think that this is one of the few letters that it may be desirable to read at length.

(Sir Richard Webster thereupon read the remainder of the above letter, as follows :)

In the meanwhile, further details in regard to these seizures have been sent to this country, and Her Majesty's Government now consider it incumbent on them to bring to the notice of the United States' Government the facts of the case as they have reached them from British sources.

It appears that the three schooners, named respectively the "Carolina," the "Onward," and the "Thornton," were fitted out in Victoria, British Columbia, for the capture of seals in the waters of the Northern Pacific Ocean, adjacent to Vancouver's Island, Queen Charlotte Islands, and Alaska.

According to the depositions inclosed herewith from some of the officers and men, these vessels were engaged in the capture of seals in the open sea out of sight of land, when they were taken possession of on or about the 1st August last by the United States' Revenue cutter "Corwin," the "Carolina," in latitude 53° 52' north, longitude 168° 53' west, the "Onward" in latitude 50° 52' north, longitude 167° 55' west, and the "Thornton" in about the same latitude and longitude.

They were all at a distance of more than 60 miles from the nearest land at the time of their seizure, and on being captured were towed by the "Corwin" to Ounalaska, where they are still detained. The crews of the "Carolina" and "Thornton," with the exception of the captain and one man on each vessel detained at that port, were, it appears, sent by the steamer "St. Paul" to San Francisco, California, and then turned adrift, while the crew of the "Onward" were kept at Ounalaska.

At the time of their seizure the "Carolina" had 686 seal-skins on board, the "Thornton" 404, and the "Onward" 900, and these were detained, and would appear to be still kept at Ounalaska along with the schooners by the United States' authorities.

According to information given in the "Alaskan," a newspaper published at Sitka in the Territory of Alaska, and dated the 4th September, 1886, it is reported :

1. That the master and mate of the schooner "Thornton" were brought for trial before Judge Dawson in the United States' District Court at Sitka on the 30th August last.

2. That the evidence given by the officers of the United States' Revenue cutter "Corwin" went to show that the "Thornton" was seized while in Behring's Sea, about 60 or 70 miles south-south-east of St. George Island, for the offence of hunting and killing seals within that part of Behring's Sea which (it was alleged by the "Alaskan" newspaper) was ceded to the United States by Russia in 1867.

3. That the Judge in his charge to the jury, after quoting the 1st Article of the Treaty of the 30th March, 1867, between Russia and the United States, in which the western boundary of Alaska is defined, went on to say : "All the waters within the boundary set forth in this Treaty to the western end of the Aleutian Archipelago and chain of islands are to be considered as comprised within the waters of Alaska, and all the penalties prescribed by law against the killing of fur-bearing animals must therefore attach against any violation of law within the limits heretofore described. If, therefore, the jury believe from the evidence that the defendants, by themselves or in conjunction with others, did, on or about the time charged in the information, kill any otter, mink, marten, sable, or fur-seal, or other fur-bearing animal or animals, on the shores of Alaska or in the Behring's Sea east of 193° of west longitude, the jury should find the defendants guilty, and assess their punishment separately, at a fine of not less than 200 dollars nor more than 1,000 dollars, or imprisonment not more than six months, or by both such fine, within the limits herein set forth, and imprisonment.

4. That the jury brought in a verdict of guilty against the prisoners, in accordance with which the master of the "Thornton," Hans Guttousen, was sentenced to imprisonment for thirty days and to pay a fine of 500 dollars, and the mate of the "Thornton," Norman, was sentenced to imprisonment for thirty days and to

pay a fine of 300 dollars, which terms of imprisonment are presumably now being carried into effect.

There is also reason to believe that the masters and mates of the "Onward" and "Carolina" have since been tried, and sentenced to undergo penalties similar to those now being inflicted on the master and mate of the "Thornton."

You will observe, from the facts given above, that the authorities of the United States appear to lay claim to the sole sovereignty of that part of Behring's Sea lying east of the westerly boundary of Alaska, as defined in the 1st Article of the Treaty concluded between the United States and Russia in 1867, by which Alaska was ceded to the United States, and which includes a stretch of sea extending in its widest part some 600 or 700 miles easterly...

That should, of course, be "westerly" from the mainland of Alaska.

In support of this claim, those authorities are alleged to have interfered with the peaceable and lawful occupation of Canadian citizens on the high seas, to have taken possession of their ships, to have subjected their property to forfeiture, and to have visited upon their persons the indignity of imprisonment.

Such proceedings, if correctly reported, would appear to have been in violation of the admitted principles of international law.

I request that you will, on the receipt of this despatch, seek an interview with Mr Bayard and make him acquainted with the nature of the information with which Her Majesty's Government have been furnished respecting this matter, and state to him that they do not doubt that, if on inquiry it should prove to be correct, the Government of the United States will, with their well known sense of justice, at once admit the illegality of the proceedings resorted to against the British vessels and the British subjects above mentioned, and will cause reasonable reparation to be made for the wrongs to which they have been subjected, and for the losses which they have sustained.

Should Mr Bayard desire it, you are authorized to leave with him a copy of this despatch.

I am, etc.,

IDDLESLEIGH.

The President. — I suppose there is a mistake in the print as regards the latitude where the "Onward" and the "Thornton" were seized. In this despatch it is marked $50\frac{1}{2}^{\circ}$ north, and that would be out of Behring Sea. I suppose that must be a mistake, because nobody alleges the ships were seized out of Behring Sea.

Sir Richard Webster. — I did not read those latitudes because I knew they were not geographically correct. It appears from other papers that they were all seized in Behring Sea.

Sir Charles Russell. — The Tribunal will see that this is a very grave allegation. The attention of the Government of the United States is called to it as early as the 9th October, and one would have expected that in a grave matter of this kind the Executive would have been in possession of complete information as to what the facts were.

Here are two Powers fortunately at peace and in most friendly relations with one another. A number of the vessels of one of those Powers are seized upon the sea, without any suggestion of previous diplomatic representation or expostulation of any kind; and yet as late as the 12th November, if you will turn to page 27, you will find Mr Bayard (an able and

courteous Statesman of the United States, whom I have the pleasure of knowing) writes on that day and says :

The delay in my reply to your letters of the 27th September and 21st October, asking for information, concerning the seizure by the United States Revenue cutter "Corvin" in the Behring Sea, of British vessels for an alleged violation of the laws of the United States in relation to the Alaska seal fisheries, has been caused by my waiting to receive from the Treasury Department the information you desire d.....

My application to my colleague the Attorney General to procure an authentic Report of these proceedings was promptly made, and the delay in furnishing the Report doubtless has arisen from the remoteness of the place of trial.

A soon as I am enabled, I will convey to you the facts as ascertained in the trial, and the rulings of law as applied by the Court.

Let me ask the Tribunal to realise the position of things. He has been told that the seizure has taken place in Behring Sea, when these vessels were in pursuit of fur-seals. He has been told that they were seized at distances from land which showed that they were outside the ordinary territorial limits; and yet the Secretary of State cannot give any answer to the challenge of Lord Iddesleigh, who affirms that these facts point to a grave breach of international law, but must wait till he gets the exact information from the place of trial.

Senator Morgan. — How can that be if the British Government disclaims all responsibility for the conduct of its nationals?

Sir Charles Russell. — I am sure it is my fault, Sir; but the appositeness, or connection with my argument, of that remark I fail quite to appreciate.

Senator Morgan. — I understand that the British Government has disclaimed in the diplomatic correspondence, and excluded from the Treaty, all considerations of responsibility for the conduct of its nationals in taking fur-seals. If that be so, I do not understand why it is that Mr Bayard was required to make any representation to the British Government about a matter that he wished to redress or prevent.

Sir Charles Russell. — Sir, I still fail, with all sincere respect, to see the connection with the argument I am pursuing.

Senator Morgan. — I regret that you fail to see it.

Sir Charles Russell. — I am calling attention to the fact that Lord Iddesleigh has stated facts, which are not contradicted, of the seizure of British vessels on the high sea outside territorial limits; seized not by the act of individuals, but seized by the act of the State through its Executive Authority.

Lord Hannen. — What is your ground of complaint, Sir Charles? It was necessary to ascertain the facts, and the scene of action was a long way off.

Sir Charles Russell. — With great deference, my Lord, No. If the case really were, that they could justify themselves as having a legislative power over Behring Sea, or, which is the case now made, as protecting their property in the fur-seals, there was a prompt and immediate answer.

“ We have committed no offence against international law at all. ” It is one of the many proofs that I am going to adduce that this case which is now presented to this Tribunal——

Lord Hannen. — I understand that you do not make it a ground of complaint that they took time to ascertain the facts; but you say that they did not take up the ground that they are now taking up.

Sir Charles Russell. — Certainly; that is my point; one of the many points which will go to show that as this case developed itself in the diplomatic correspondence, and as it has still further developed itself in the course of the printed argument, it has taken a form that was not present to the mind of the Executive at the time of these occurrences; as it ought to have been present if the case were as real as it is now made out.

That brings us to the 12th of November, 1886. I now refer to page 37 of the same book. We have got to the 8th of January, and Lord Iddesleigh again writes.

Referring to previous correspondence in regard to the case of the three Canadian schooners engaged in the seal fishery in Behring Sea, I transmit to you herewith a copy of a letter from the Colonial Office, with a despatch, and its enclosures, from the Governor-General of Canada, explaining the views of the Dominion Government in the matter.

Nearly four months have now elapsed since my despatch of the 9th September last was addressed to you, in which you were directed to invite the Government of the United States to furnish you with any particulars..... I have now to instruct you to express to Mr Bayard.

and so on.

Thereupon, the next day, as appears at the bottom of the same page, Sir Lionel West communicates with Mr Bayard; and on the 12th of January, at page 39, Mr Bayard writes :

Your note of the 9th instant was received by me on the next day, and I regret exceedingly that, although my efforts have been diligently made to procure from Alaska the authenticated “ copies ”..... I should not have been able to obtain them in time to have made the urgent and renewed application of the Earl of Iddesleigh superfluous.

The pressing nature of your note constrains me to inform you that on the 27th September last, when I received my first intimation from you that any question was possible as to the validity of the judicial proceedings referred to, I lost no time in requesting my colleague the Attorney-General, in whose Department the cases were, to procure for me such authentic information as would enable me to make full response to your application.

Then he says he is awaiting the papers, explains that the distance of the vessels from any land or the circumstances attendant upon their seizure were unknown to him, and then treats it, and quite accurately treats it, as a matter which is of so grave importance that it is right they should be in possession of accurate information. Then, on the 3rd of February, which is on the next page, is a further letter, in which he says :

“ I made instant application to my colleague the Attorney General in relation to the record of the judicial proceeding ”.

and so on.

I am informed that the documents in question left Sitka on the 26th January, and may be expected to arrive at Port Townsend, and so on.

and so on.

Then :

In this connection, I take occasion to inform you that, without conclusion at this time of any questions which may be found to be involved in these cases of seizure, orders have been issued, by the President's direction, for the discontinuance of all pending proceedings, the discharge of the vessels referred to, and the release of all persons under arrest in connection therewith.

Now I want to know why this is so. Does any one member of this Tribunal believe that at that time, the Secretary of State being in communication with the Attorney General, as his correspondence shows, and in correspondence (who can doubt it) with the head of the Executive of the United States — I mean the President — that if they had intended to take this ground of legal justification for the seizures, they would not at least have hinted that there existed some such ground and given some indication of what that ground was? On page 85 will be found the official intimation of that release, a telegram from the Attorney General of the 26th January 1887 to Judge Lafayette Dawson and Mr D. Ball, District Attorney, Sitka, Alaska.

I am directed by the President to instruct you to discontinue all further proceeding in the matter of the seizure of the British Vessels "Caroline" "Onward" and "Thornton" and discharge all vessels now held under such seizure, and release all persons that may be under arrest in connection therewith.

I have told you what was the fate of that telegram — how the order was treated as a forged order : although sent to the Judge (as appears from the order on the same page) how it was not acted upon till the release of the vessels was useless and the men had undergone their imprisonment and suffered the penalty imposed by the judgment.

But that is, of course, a minor point. The question that the Tribunal must ask itself is, is it conceivable that that order for release could have been made upon any ground except one, namely, the advice of the responsible legal adviser of the President, that he was of opinion that it was at least doubtful whether the seizures could in any way be justified.

Senator Morgan. — Do you mean Mr Bayard?

Sir Charles Russell. — I said the legal adviser, Sir?

Senator Morgan. — Who is that?

Sir Charles Russell. — The Attorney General, Mr Garland; and in answer to Senator Morgan's question, which he has been good enough to put to me, I can show by the very next page that that was the view of the Secretary of State, Mr Bayard himself. It is an extract from a paper published in Victoria.

General Foster. — All of these are extracts.

Sir Charles Russell. — Certainly.

Senator Morgan. — I thought you were reading from the diplomatic correspondence.

Sir Charles Russell. — So I was, Sir, but General Foster is referring to an extract on the page in question. Of course, what I have been reading is diplomatic correspondence.

Senator Morgan. — Yes, I thought so.

Sir Charles Russell. — Here is a matter which, if not true, would have been denied : This is the statement in the middle of page 87.

BAYARD'S OPINION.

The following telegram is another unofficial announcement, and seems to be rather out of harmony with the official acts of the commanders of the Revenue cutters.

Washington, July 20.

Secretary Bayard, when he was shown to-day a despatch from Ottawa, stating that the Dominion Government is protesting against the discourtesy shown by the United States authorities in ignoring its demand for reparation for the seizure and detention of the British Columbia Sealers seized in Behring Sea last year, said : " In the first place no demand was ever made to our Government by any body either for the release of the vessels in question or for damages for their detention.

That is quite true.

And in the second place, if any such demand had been made, it could not have come by any possibility from the Dominion Government, with which we have no diplomatic relations whatsoever.

That is also true.

The vessels in question were released upon representations of the British Government that they were British vessels. They were released because our right to hold them was deemed too doubtful to be enforced. Our Government did what it believed to be right in the matter, without constraint from any quarter.

Senator Morgan. — Is that a newspaper correspondence quoting Mr Bayard's statement.

Sir Charles Russell. — It is exactly what I read, namely, a telegram which purports to record Mr Bayard's opinion.

Mr Phelps. — In a Canadian newspaper.

Sir Charles Russell. — I assure you these interruptions are uncalled for. I do not often complain, but I took pains to state what it was. I read the announcement of it in the paper itself. I said that it appeared in a paper which I named, published in a place I named, and I read the parts of the telegram.

The following document is another unofficial announcement, and seems to be rather out of harmony with the official acts of the commanders of the Revenue cutters.

Senator Morgan. — I beg your pardon, Sir Charles, for the interference on my part.

Sir Charles Russell. — No, Sir, not at all.

Senator Morgan. — But I wanted to find out whether you impute those statements to Mr Bayard as under his pen, or under his tongue, or as the results of a newspaper correspondence of what he might have said on some occasion.

The President. — You give credit to them for trying to represent, with correctness, the views of Mr Bayard.

Sir Charles Russell. — That, of course, is the point. It attributes to Mr Secretary Bayard a certain opinion and a certain explanation of a particular course of executive conduct, namely the release of these vessels. That is published in the Press; it is published in our Case, it is part of our original case, and up to this moment it has never been denied; and I say at once, if Mr Bayard (whom as I have already said I have the honor to know), should say that that was not true, I should accept without hesitation or qualification his statement to that effect. It is a comparatively unimportant point, because, as I said, unless that is true it is inconceivable that if the United States and their advisers had the view of their legal rights which are put forward in a later stage of this diplomatic correspondence — which are put forward in later phases of this, shall I call it “litigation” — it is inconceivable that at the time he gave this order for release Secretary Bayard’s real views can have been expressed by such words as these.

“ We think we are within our rights in making these seizures; we think that our rights justify us in making these seizures; we base these rights on this ground or on that ground, but as an act of good will to a friendly Government with whom previously we have had no diplomatic expostulations, and to which we had previously given no diplomatic warning — as an act of friendliness and good will to that Government, with whom we are at peace, we will, under the circumstances, release those vessels ”.

Senator Morgan. — I am sure, Sir Charles, you will not object to my calling your attention, in vindication of Mr Bayard, to the fact that in his correspondence with the British Government on this subject — at least so far as I am advised it is so — he laid aside the question of the merits of seal fishing and seal hunting. All those questions about Behring Sea, and right of property, he set aside, with a view of discussing and settling with Lord Salisbury the question of Regulations. I do not remember that he ever took up the subject of the alleged rights of the respective parties, and dealt with that as an independent topic in his diplomatic correspondence.

Sir Charles Russell. — Sir, we are taking time, too literally, by the forelock. We have not got to the portion of the correspondence where that appears. I shall come to that in a few moments. I am dealing with events as they appeared in January 1887: you, Sir, are referring to events as they appeared in August 1887. I will come to them in due course.

Senator Morgan. — I am referring to the same period as you are referring to Sir Charles, in which you were stating, as I understand, that Mr Bayard should have made an objection at that time to the action of his Government if he had dissented from it, or affirmed it if he approved it.

Sir Charles Russell. — I do not say that he should have dissented from the action of his Government at all, because it was, as I take it, his own action to a certain extent.

Senator Morgan. — I am speaking of the Judges.

Sir Charles Russell. — He was a member of the Government. What I am pointing out is, that if there had been any conception of the existence of such legal rights as are now invoked in justification of his conduct, one would have expected to find from Mr Secretary Bayard, or from some other executive officer, some foreshadowing of these grounds.

Senator Morgan. — Certainly, if he was dealing with that phase of the question, but I do not think that he was.

Sir Charles Russell. — His Government is charged as distinctly as a Government can be charged, in the very long despatch from Lord Iddesleigh that I have read, with a most grave offence against international law. His answer is : — I have released the vessels because I consider it too doubtful whether we were entitled to hold them.

Senator Morgan. — I do not think he said that.

Sir Charles Russell. — At present, the state of the case is, that I cannot affirm that he said it. I do not affirm that he said it, for I do not know. All I know is, that it is published that he said it, and that so far as I know up to this moment there has been no contradiction of the fact.

Lord Hannen. — Does it appear when the record of the proceedings in the Alaskan Court was received at Washington.

Sir Charles Russell. — It was, in fact, received in April 1887. I am now coming to it in the order of time, and Senator Morgan will find that I shall omit nothing which I conceive to be important as throwing light on what were the motives and state of opinion of the Executive at this time.

On the 12th April Mr Bayard writes to Sir Sackville West in these terms.

SIR : I have the honour to acknowledge your note of the 4th instant relative to the fisheries in Behring Sea, and inquiring whether the documents referred to in my note of the 3rd February relating to the cases of seizure in those waters of vessels charged with violating the laws of the United States regulating the killing of fur-seals, had been received. The records of the judicial proceedings in the cases in the District Court in Alaska referred to were only received at this department on Saturday last and are now under examination.

The remoteness of the scene of the fur-seal fisheries, and the special peculiarities of that industry, have unavoidably delayed the Treasury officials in framing appropriate Regulations, and issuing orders to United States' vessels to police the Alaskan waters for the protection of the fur-seals from indiscriminate slaughter, and consequent speedy extermination.

The laws of the United States in this behalf are contained in the Revised Statutes relating to Alaska in sections 1956-1971, and have been in force for up wards of seventeen years, and prior to the seizures of last summer but a single infraction is known to have occurred, and that was promptly punished.

That must have been some American sealer, though we have not heard of it before. I do not know the history of it. Then the letter continues :

The question of instructions to Government vessels in regard to preventing the indiscriminate killing of fur-seals is now being considered, and I will inform you at the earliest day possible what has been decided, so that British and other vessels visiting the waters in question can govern themselves accordingly.

I am not asking the assent of the Tribunal or any member of it to any conclusion as I go on, as I have achieved my sole purpose if I have satisfied myself that I am making my motive and my argument intelligible to the Tribunal. We get here, therefore, for the first time a suggestion — not put forward as a justification — but a suggestion, which is a reference to the United States Revised Laws, sections 1956-1971; but there is no suggestion in point of fact in what sense they are supposed to apply.

Now we pass on, and on the 10th of September comes a very important communication, at page 88, from Lord Salisbury. I think this one and one other are the only two that I shall ask to be read in full; but inasmuch as this puts forward the grounds upon which Lord Salisbury supposes it is suggested that the executive action may be excused or justified, I think it desirable that they should be fully read.

Sir Richard Webster. — It is on page 88. This is from the Marquis of Salisbury to Sir Lionel West :

Foreign Office, September, 10th, 1887.

Sir : By a despatch of the 30th October last the late Earl of Iddesleigh instructed you to call the attention of the United States Secretary of State to the circumstances of the seizure in Behring's Sea, by the American cruizer "Corwin" of some British Canadian vessels, and his Lordship directed you to state to Mr Secretary Bayard that Her Majesty's Government felt sure that if the proceedings which were reported to have taken place in the United States' District Court were correctly described, the United States' Government would admit their illegality, and would cause reasonable reparation to be made to the British subjects for the wrongs to which they had been subjected and for the losses which they had sustained.

By a previous despatch of the 9th September you had been desired to ask to be furnished with any particulars which the United States' Government might possess relative to the seizures in question; and on the 20th October you were instructed to enter a protest on behalf of Her Majesty's Government and reserve for consideration hereafter all rights to compensation.

Nearly four months having elapsed without any definite information being furnished by the United States Government as to the grounds of the seizures my predecessor instructed you, on the 8th January last, to express to Mr Bayard the concern of Her Majesty's Government at the delay, and to urge the immediate attention of the United States' Government to the action of the American authorities in their treatment of these vessels, and of their masters and crews.

On the 3rd February Mr Bayard informed you that the record of the judicial proceeding which he had called for was shortly expected to reach Washington, and

that, without conclusion at that time of any questions which might be found to be involved in these cases of seizures, orders had been issued by the President's direction for the discontinuance of all pending proceedings, the discharge of the vessels referred to, and the release of all persons under arrest in connection therewith.

On the 4th of April, under instructions from me, you inquired of Mr Bayard, in view of the approaching fishing season in Behring's Sea, whether the owners of British vessels might rely when not near land on being unmolested by the cruisers of the United States, and you again asked when the record of the judicial proceedings might be expected. Mr Bayard informed you, in reply (12th April), that the papers referred to had reached him and were being examined; that there had been unavoidable delay in framing appropriate Regulations and issuing orders to United States' vessels to police the Alaskan waters; that the Revised Statutes relating to Alaska, Sections 1956 and 1971, contained the laws of the United States in relation to the matter; and that the Regulations were being considered, and he would inform you at the earliest day possible what had been decided, so that British and other vessels might govern themselves accordingly.

In view of the statements made by Mr Bayard in his note of the 3rd February, to which I have referred above, Her Majesty's Government assumed that, pending a conclusion of the discussion between the two Governments on the general question involved, no further similar seizures of British vessels would be made by order of the United States Government. They learn, however, from the contents of Mr Bayard's note of the 13th August last, inclosed in your despatch of the 15th August, that such was not the meaning which he intended should be attached to his communication of the 3rd February; and they deeply regret to find a proof of their misinterpretation of the intentions of the United States Government from an announcement recently received from the Commander-in-chief of Her Majesty's naval forces in the Pacific, that several more British vessels engaged in seal-hunting in Behring's Sea have been seized when a long distance from land by an American Revenue vessel.

Her Majesty's Government have carefully considered the transcript of record of the judicial proceedings in the United States " District Court in the several cases of the schooners " Carolina ", " Onward " and " Thornton which were communicated to you in July, and were transmitted to me in your despatch of the 12th of that month, and they cannot find in them any justification for the condemnation of those vessels.

The libels of information allege that they were seized for killing fur seal within the limits of Alaskan Territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States; and the United States Naval Commander Abbey certainly affirmed that the vessels were seized within the waters of Alaska and the Territory of Alaska; but according to his own evidence they were seized 75, 115, and 70 miles respectively south-south-east of St. Georges Island.

It is not disputed, therefore, that the seizures in question were effected at a distance from land far in excess of the limit of maritime jurisdiction which any nation can claim by international law, and it is hardly necessary to add that such limit cannot be enlarged by any municipal law.

The claim thus set up appears to be founded on the exceptional title said to have been conveyed to the United States by Russia at the time of the cession of the Alaska Territory. The pretension which the Russian Government at one time put forward to exclusive jurisdiction over the whole of Behring Sea was, however, never admitted either by this country or by the United States of America. On the contrary, it was strenuously resisted, as I shall presently show, and the American Government can hardly claim to have received from Russia rights which they declared to be inadmissible when asserted by the Russian Government. Nor does it appear from the text of the Treaty of 1867 that Russia either intended or purported to make any such grant; for, by Article I of that instrument, Russia agreed to cede to the United States all the territory and dominion then possessed by Russia on the continent of America and in the adjacent islands within cer-

tain geographical limits described, and no mention was made of any exclusive right over the waters of Behring Sea.

Moreover, whatever rights as regards their respective subjects and citizens may be reciprocally conferred on the Russian and American Governments by treaty stipulation, the subjects of Her Majesty cannot be thereby affected, except by special arrangement with this country.

With regard to the exclusive claims advanced in times past by Russia, I transmit to you documents communicated to the United States Congress by President Monroe in 1822, which show the view taken by the American Government of these pretensions.

In 1821 the Emperor of Russia had issued an edict establishing Rules for the limits of navigation and order of communication along the coast of the eastern Siberia, the north-western coast of America, and the Aleutian Kurile and other islands.

The first section of that edict said : The pursuit of commerce whaling and fishery, and of all other industry on all islands, ports, and gulfs, including the whole of the north-west coast of America, beginning from Behring's Straits to the 51th degree of northern latitude ; also from Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring's Straits to the south Cape of the Island of Urup, viz., to 45° 50' of northern latitude, is exclusively granted to Russian subjects ; and section II stated : It is, therefore, prohibited to all foreign vessels not only to land on the coast land islands belonging to Russia, as stated above, but also to approach them within less than 100 italian miles. The transgressor's vessel is subject to confiscation, along with the whole cargo.

A copy of these regulations was officially communicated to the American Secretary of State by the Russian Minister at Washington on the 14th February 1822 ; whereupon Mr Quincy Adams, on the 25th of that month, after informing him that the President of the United States had seen with surprise the assertion of a territorial claim on the part of Russia, extending to the 51th degree of north latitude on the American Continent and a Regulation interdicting to all commercial vessels other than Russian, upon the penalty of seizure and confiscation, the approach upon the high seas within 100 italian miles of the shores to which that claim was made to apply, went on to say that it was expected before any act which should define the boundary between the territories of the United States and Russia, that the same would have been arranged by Treaty between the parties, and that to exclude the vessels of American citizens from the shore *beyond the ordinary* distance to which territorial jurisdiction extends has excited still greater surprise ; and Mr Adams asked whether the Russian Minister was authorized to give explanations of the grounds of right, upon principles generally recognized by the laws and usages of nations, which can warrant the claims and Regulations.

The Russian Minister in his reply, dated the 28th February, after explaining how Russia had acquired her possessions in North America said :

‘ I ought in last place to request you to consider, sir, that the Russian possessions in the Pacific Ocean extend on the north-west coast of America from Behring's strait to the 51st degree on north latitude and on the opposite side of Asia and the islands adjacent from the same Strait to the 45th degree. The extent of Sea of which these possessions form the limits comprehends all the conditions which are ordinarily attached to *shut seas* (*mers fermées*), and the Russian Government might consequently judge itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners ; but it preferred only asserting its essential rights without taking advantage of localities.’

On the 30th March Mr Adams replied to the explanations given by the Russian Minister. He stated that, with respect to the pretension advanced in regard to territory, it must be considered not only with reference to the question of territorial rights, but also to that prohibition to the vessels of other nation, including those of the United States, to approach within 100 Italian miles of the coasts. That from the period of the existence of the United States as an independent nation their

vessels had freely navigated these seas, the right to navigate them being a part of that independence; and with regard to the suggestion that “ the Russian Government might have justified the exercise of sovereignty over the Pacific Ocean as a close sea, ‘because it claims territory both on its American and Asiatic shores’, it may suffice to say that the distance from shore to shore on this sea, in latitude 51° north, is not less than 90 degrees of longitude, or 4000 miles Mr Adams concluded as follows : ‘The President is persuaded that the citizens of this Union will remain unmolested in the prosecution of their lawful commerce, and that no effect will be given to an interdiction manifestly incompatible with their rights’ ”.

The convention between the United States of America and Russia of the 17th April 1824, put an end to any further pretension on the part of Russia to restrict navigation or fishing in Behring Sea so far as American citizens were concerned; for by article 1 it was agreed that in any part of the Great Ocean, commonly called the Pacific Ocean or South Sea, the respective citizens or subjects of the High Contracting Powers shall neither be disturbed nor restrained, either in navigation or fishing, saving certain restrictions which are not material to the present issue; and a similar stipulation in the Convention between this country and Russia in the following year (15th May, 1825) put an end, as regarded British subjects, to the pretensions of Russia to which I have referred, and which had been entirely repudiated by Her Majesty’s Government in correspondence with the Russian Government in 1821 and 1822, which for your more particular information I inclose herein.

Her Majesty’s Government feel sure that, in view of the considerations which I have set forth in this despatch, which you will communicate to Mr Bayard, the Government of the United States will admit that the seizure and condemnation of these British vessels, and the imprisonment of their masters and crews, were not warranted by the circumstances, and that they will be ready to afford reasonable compensation to those who have suffered in consequence, and issue immediate instructions to their naval officers which will prevent a recurrence of these regrettable incidents.

I am, etc.

SALISBURY.

Sir Charles Russell. — Now the Tribunal will observe that Lord Salisbury is there answering the only case which was put forward, namely the judgment of Mr Justice Dawson, which resulted in the confiscation of these ships — which resulted, of course, in altering the property in these ships; and the surprising thing is —

The President. — The judgment of Judge Dawson was delivered previously to the 3rd of February.

Sir Charles Russell. — Oh, long previously.

The President. — It was before the order of release was sent.

Sir Charles Russell. — Lord Salisbury had only got before him the record of the proceedings in the Court, and the judgment of the Court of Sitka. That was the only case he had to deal with, and he deals with it in a way I shall have hereafter to refer to in another connection in considering the derivative title claimed under Russia. But will not the Tribunal be surprised to hear that that despatch of Lord Salisbury, written upon the 10th September 1887, received no answer from the representative of the United States, until the year 1890 ?

If I am wrong in this, let me be corrected on the spur of the moment. That despatch of Lord Salisbury deals with the only case that is suggested — he has got before him the only thing upon which he can form a judgment, namely the record of the proceedings at Sitka, and he proceeds, effectually I submit, to demolish that case. But, that I may omit no-

thing, let me say that Mr Bayard *had* done something meanwhile; and what was it? He had written on the 19th August 1887 the letter which has been referred to more than once in the course of the argument by learned friend, Mr Carter. This letter is not to be found in our appendix : it is not to be found, for the reason that it was not in fact sent to us at all. It was a circular letter addressed by Mr Bayard to the representatives of the United States in the various capitals of the world. No direct communication of this letter was made to Great Britain, but the communication was shewn or the purport of it notified to us by Mr Phelps, the then Minister for the United States in London, on the 11th of November 1887.

I will now read that letter, which is in the first Volume of the Appendix to the Case of the United States, page 168. I desire that the Tribunal should have all the materials before them in order to appreciate, in the order of events, the position taken up by the respective Governments.

SIR : Recent occurrences have drawn the attention of this Department to the necessity of taking steps for the better protection of fur-seal fisheries in Behring Sea.

Without raising any question as to the exceptional measures which the peculiar character of the property in question —

That is the fur-seal fisheries —

might justify this Government in taking, and without reference to any exceptional marine jurisdiction that might properly be claimed for that end, it is deemed advisable — and I am instructed by the President so to inform you — to attain the desired ends by international co-operation.

It is well known that the unregulated and indiscriminate killing of seals in many parts of the world has driven them from place to place, and by breaking up their habitual resorts has greatly reduced their number. Under these circumstances, and in view of the common interest of all nations in preventing the indiscriminate destruction and consequent extermination of an animal which contributes so importantly to the commercial wealth and general use of mankind, you are hereby instructed to draw the attention of the Government to which you are accredited to the subject, and to invite it to enter into such an arrangement.

And so on.

This was the departure point of the scheme which contemplated a set of International rules not confined to the United States and to Great Britain, but which should have the concurrence of all the other nations which were, or might be, interested. But, again, am I not justified in asking the Tribunal to note in passing here, that while there is a tentative and indirect suggestion that there may be some other ground upon which the Government of the United States may justify its action, yet that this ground is not stated as a proposition by which Mr Bayard desires to bind either himself or his Government, much less is it an affirmation of any legal principle upon which he feels justified in taking his stand? And now, I repeat, is it not an amazing fact that the despatch of Lord Salisbury, which I have ventured to submit demolishes the only case suggested, and sug-

gested too by the judicial record of the proceedings at Sitka, should have remained unanswered — I think it remains unanswered to this day — but remained without any appearance of answer until the 22nd of January 1890, or more than two years after its despatch?

Now, I do not seek to be drawn into any bye-issues. As Lord Salisbury, who had succeeded to Lord Iddesleigh, believed, there had been a breach of a promise made that no further seizures should be effected; and Lord Salisbury records his statement that he had been so assured in a letter of the 8th of April, 1888, which is to be found at page 189 of the large volume. It refers to an interview with Mr Phelps, stating that he was very anxious for despatch because of the destruction of the species which was going on, and which he considered a matter of grave moment; and then he proceeds.

He informed me, therefore, unofficially, that he had received from Mr Bayard a private letter, from which he read to me a passage to the following effect: "I shall advise that secret instructions be given to American cruisers not to molest British ships in Behring Sea at a distance from the shore, and this on the ground that the negotiations for the establishment of a close time are going on."

And then:

But, Mr Phelps added, there is every reason that this step should not become public, as it might give encouragement to the destruction of seals that is taking place.

And so forth. It is a bye-point, and I do not seek to dwell upon it. There must have been some misunderstanding because, as a matter of fact, we know that the seizures were renewed.

Meanwhile, there is a change of Government in the United States, and in March, 1889, President Harrison succeeds to President Grover Cleveland; and Mr Blaine succeeds, as Secretary of State, to Mr Bayard. And I will only say that I have myself very little doubt (if I may, for the moment, intrude a suggestion of that kind, which means no disrespect to anybody) that judging from the tenor of Mr Bayard's communications and the position he took up, and the executive action that he authorised and directed, — I cannot doubt that if he had continued Secretary of State, we should have had the case settled as a matter of common interest, and discussed as a matter of common interest, to all the Nations; and certainly some of the portions of the claim now put forward never would have been heard of, because they are inconsistent with the attitude which he himself, in his executive capacity, took up.

But Mr Blaine, on the 22nd of January, wrote his celebrated despatch, which is known as the *contra bonos mores* despatch; and there is that very great break, partly accounted for by the fact, I admit, that negotiations were going on which it was hoped might end the whole difficulty, but still I cannot believe that if in the minds of the advisers of the United States there had been present, even in a faint degree, the existence of definite legal grounds upon which their action could be defended or justified, that we should not

First appearance of *contra bonos mores* argument.

have had some assertion of it at some time or other in answer to these communications of Lord Iddesleigh, in the first instance, and Lord Salisbury, in the second. On the 22nd of January comes this despatch; and I will just notice, in passing, that, at page 315, there is a letter from Lord Salisbury on the 2nd of October, 1889, in the middle of which he says :

In a despatch' to Sir Lionel West dated the 10th September, 1887, which was communicated to Mr Bayard, I drew the attention of the Government of the United States to the illegality of these proceedings, and expressed a hope that due compensation would be awarded to the subjects of Her Majesty who had suffered from them. I have not since that time received from the Government of the United States any intimation of their intentions in this respect, or any explanation of the grounds upon which interference with the British sealers had been authorised. Mr Bayard did indeed communicate to us unofficially an assurance that no further seizures of this character should take place.

And so on.

Now, we come to the celebrated *contra bonos mores* despatch, at page 396, dated the 22nd of January. I may relieve the minds of the Tribunal at once by saying that I am not going to read it all, as it has been already read more than once. Of course, if there is any passage in connection with that doctrine which throws light upon it, I will read it if my learned friend suggests. This is the celebrated sentence.

Several weeks have elapsed since I had the honour to receive through the hands of Mr Edwardes.

Subjects which could not be postponed have engaged the attention of this Department, and have rendered it impossible to give a formal answer to Lord Salisbury until the present time.

In the opinion of the President the Canadian vessels, arrested and detained in the Behring Sea, were engaged in a pursuit that is in itself *contra bonos mores* — a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States. To establish this ground, it is not necessary to argue the question of the extent and nature of the sovereignty of this Government over the waters of the Behring Sea; it is not necessary to explain, certainly not to define, the powers and privileges ceded by His Imperial Majesty the Emperor of Russia in the Treaty by which the Alaskan territory was transferred to the United States. The weighty considerations growing out of that territory, with all the rights on land and sea inseparably connected therewith, may be safely left out of view while the grounds are set forth upon which this Government rests its justification for the action complained of by Her Majesty's Government.

And then he proceeds to argue upon the ground that this is an immoral traffic, that it is a traffic which interferes with the rights of the Government and people of the United States, and then he proceeds, rather adroitly, having made some approaches to argument in support of his own view, to shift the *onus*.

He says at the bottom of page 397 :

Whence did the ships of Canada derive the right to do in 1886 that which then had refrained from doing for more than 90 years ?

And finally he refers to the fisheries on the banks of Newfoundland

as if suggesting there was some parallel, and he refers to dynamite or giant-powder explosions — those I will refer to because they are afterwards used by Mr Phelps. He asks why the two cases are not parallel. I will attempt to give the answer a little later. And he finally says :

In the judgment of this Government the law of the sea is not lawlessness.

Which is a graceful piece of alliteration.

Nor can the law of the sea and the liberty which it confers and which it protects be perverted to justify acts which are immoral in themselves.

Well I need not say therefore that in this despatch, although he suggests that there may be grounds based upon jurisdiction derived from Russia, his main ground is that the thing is *contra bonos mores*, a crime in itself, a crime which they, the United States, have a right to complain of, because it is an injury to them.

Well, now, what is the subsequent course which this correspondence takes? It may be described in a sentence, though I have two more despatches to refer to, one at a little length. Lord Salisbury meets him upon his own ground and says : You say that this is *contra bonos mores* ; Have nations said it? You say that this is an injury to your rights. What are your rights? Upon what law are they defensible? By what law are they recognized and protected?

From that moment you will find that Mr Blaine, driven from his *contra bonos mores* ground, driven from the field, recurs to the Russian derivative title, and thereafter, until he comes to cite with approbation an eloquent passage from a communication of my learned friend Mr Phelps, we hear no more of the *contra bonos mores* doctrine.

Now, in the few moments that remain, I should like to call attention to that despatch of Lord Salisbury, which I take leave to say is a despatch that has not been answered, and I submit cannot be answered. It will be found on page 462.

In the beginning of that despatch, which I will not read, he repeats, as every fair man arguing is bound to do, fully and fairly what is the contention of his adversary. He says : You say that our vessels were engaged in a pursuit *contra bonos mores* : You say that these fisheries were under the exclusive control of Russia : You say that the seals being taken by pelagic sealing in the open sea will speedily destroy the species. Now how are these arguments taken to pieces?

With regard to the first of these arguments, namely that the seizure of the Canadian vessels in the Behring Sea was justified by the fact that they were engaged in a pursuit that is in itself *contra bonos mores* — a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States, it is obvious that two questions are involved; first whether the pursuit and killing of fur-seals in certain parts of the open sea is, from the point of view of international morality, an offence *contra bonos mores*; and secondly, whether, if such be the case, this fact justifies the seizure on the high seas and subsequent confiscation in time of peace of the private vessels of a friendly nation?

Can any one doubt that that is the test which must be applied, and the only test that ought to be applied to the proposition so propounded by Mr Blaine? You say this pursuit is *contra bonos mores*. I do not agree with you. Has law declared it so? According to international morality even has it been so declared? It does not become immoral according to international law merely because you choose to say it is so! And even if that were so you still lag behind the necessities of your position, because you have still to shew that even if it were *contra bonos mores* international law would justify you in seizing in time of peace and in confiscating the ships of a friendly nation. He then proceeds to argue the broad principles which cannot be doubted, and cites in support of them the utterances of a wise President of the United States (President Tyler) who after stating there was a right to detain and search a vessel on suspicion of piracy goes on to say :

With this single exception no nation has in time of peace any authority to detain the ships of another upon the high seas on any pretext whatever outside the territorial jurisdiction.

Then Lord Salisbury goes on to point out, as I have already taken occasion to point out, that even in the case of the slave trade, a practice which the civilized world has agreed to look upon with abhorrence, the right of arresting the vessels of another country engaged in that trade is only exerciseable by special international agreement. And he finally draws this conclusion.

But Her Majesty's Government must question whether this pursuit can of itself be regarded as *contra bonos mores*, unless and until for special reasons it has been agreed by international arrangement to forbid it.

Placuitne gentibus? Do the nations of the world agree that this is a thing to be treated as *contra bonos mores*, and to be visited with their condemnation? Then he proceeds.

Fur-seals are indisputably animals *feræ naturæ*, and these have universally been regarded by jurists as *res nullius* until they are caught. No person, therefore, can have property in them until he has actually reduced them into possession by capture. It requires something more than a mere declaration that the Government or citizens of the United States, or even other countries interested in the seal trade, are losers by a certain course of proceeding, to render that course an immoral one.

And so on. And then he comes to the second argument, as regards Russia and as the argument which is there set out, and set out very well, is one which I must refer to myself in some detail, I will spare the Tribunal the reading of it at this stage. Finally, he deals with the question of whether the effect of pelagic sealing is to be treated as a fact beyond denial or doubt — that the taking of seals in the open sea will lead to their extinction; and expresses his view upon a point which deals, not with question of property or property right, but of regulations; and he deals with it upon the information then before him.

He says in that regard :

The negotiations, now being carried on at Washington, prove the readiness of Her Majesty's Government to consider whether any special international agreement is necessary for the protection of the fur-sealing industry. In its absence (that is, of international agreement) they are unable to admit that the case put forward on behalf of the United States affords any sufficient justification for the forcible action already taken by them against peaceable subjects of Her Majesty engaged in lawful operations on the high seas.

So that there is the position; and this is the last observation I take leave to make to day; the position from the first taken up and consistently maintained by Great Britain is this " A denial of your right; an utter inability on your part to justify by legal argument, or upon legal grounds, your claim of property, or property right or property interest; an inability on your part, even if you had such right, to justify what you have done in protection of that right. But, at the same time, while your right is denied, while your action, even if the right existed, is unwarranted, still the Government of Great Britain is anxious, is willing, is ready, to join in dealing with this matter by international arrangement, which shall recognise that this is not a matter of exclusive interest in the United States, but a matter of interest to the world. "

The Tribunal adjourned till to morrow morning, the 12th of May, at 11-30 o'clock.

TWENTY-SECOND DAY. MAY 12TH, 1893

Mr Tupper. — Mr President, I would like to say that the reason why none of the proofs of the last day's arguments appear upon the table of the Tribunal this morning is that, yesterday being a Public Holiday, the printers were not at work; but yesterday's report and the report of today's argument will be sent to each Member of the Tribunal on Saturday.

Sir Charles Russell. — The Tribunal will remember that the letter of Lord Salisbury of the 22nd of May, 1890, at page 462 of Volume III of Appendix to the British Case, to which I yesterday referred, and to which I intend to make no further detailed reference, took up the three grounds set forth in the argumentative letter of the Secretary of State, Mr Blaine, of the 22nd of January. It dealt with the question whether the pursuit of fur-seals by pelagic sealing was *contra bonos mores*, and it went to the heart of the question, by putting the single point : Can you say that, in the point of view of international morality, international law has ever declared that it was *contra bonos mores* : your assertion does not make it so ?

He then proceeds to deal with the derivative claim under Russia; and, lastly, he deals with the question of fact, as to which he expresses his disagreement, upon the evidence before him, from the view of Mr Blaine as to the effects of pelagic sealing.

Now, I stated in commenting on that letter that Mr Blaine's reply, to which I am now going to call attention, and which you will find at page 497 of the same volume, does not make even an attempt to grapple

with any except one of the points dealt with in the previous despatch of Lord Salisbury, to which it purported to be a reply. My learned friend, Mr Carter, speaking almost

in a tone of apology for Mr Blaine, said that he had innocently — I think my learned friend used the word "innocently" — that he had innocently allowed himself to be diverted from the true ground upon which the case of the United States ought to have been based; that he followed the scent of the herring drawn across the track by this astute statesman, Lord Salisbury; and that he did, in his answer to Lord Salisbury's despatch, omit the cardinal point of what is now said to be the United States' case.

Now this despatch, which is to be found, as I think I have said, in page 457 of the same book, is one of appalling length. It extends from page 457 to page 506! I follow the example of my learned friend

Mr Blaine's reply to Lord Salisbury's answer to the *contra bonos mores* despatch.

Mr Carter in declining to read it, and for this reason : I may describe it, and describe it with perfect accuracy, as being an elaborate and very ingenious argument upon the construction of the Treaties of 1824 and 1825; an argument by which Mr Blaine proves to his own satisfaction that the Ukase of 1821, by which Russia claimed the right to exclude all persons or all ships of other citizens from within 100 miles of the coast, was not affected by the Treaties of 1824 or 1825 at all : that those Treaties operated south of the Aleutian chain; but that the Ukase was recognized and continued to be acted upon, and acquiesced in, so far as Behring Sea was concerned.

Now I am stating his argument fairly I think, and with sufficient fulness. I will not deal with that argument in this connection, for the obvious reason that I must combat his views when I deal with the construction of the Treaties and consider the first four questions of Article V; and, as the Tribunal will see I am endeavoring as far as possible to avoid repeating myself, I must reserve that argument till its proper place in the discussion. The purpose I am now upon is to show to the Tribunal that whereas the case of derivative title under Russia, of exclusive rights and exclusive jurisdiction under Russia, is so prominently put forward in the diplomatic argument, the case which is now relied upon — the inherent right in every nation to exercise such protective measures as its interests in its own view demand — while I will not say is wholly left out of sight, takes indeed a very unimportant place in the discussion. I justify that by making but one reference before I leave this despatch. The whole pith of this argument is summed up on page 506; and at the first sentence on that page the point to which his argument is addressed is brought out.

It only remains to say that whatever duty Great Britain owed to Alaska as a Russian province, whatever she agreed to do, or to refrain from doing, touching Alaska and the Behring's Sea, was not changed by the mere fact of the transfer of sovereignty to the United States. It was explicitly declared in the VIth article of the Treaty by which the territory was ceded by Russia, that the cession hereby made conveys all the right, franchises and privileges now belonging to Russia in the said territory or dominions, and appurtenances thereto.

And he proceeds, and I read this for an additional reason, beyond that of wishing to show his contention :

Neither by the Treaty with Russia of 1825, nor by its renewal in 1843, nor by its second renewal in 1859, did Great Britain gain any right to take seals in Behring's Sea. In fact, those Treaties were a prohibition upon her which she steadily respected so long as Alaska was a Russian province. It is for Great Britain now to show by what law she gained rights in that sea after the transfer of its sovereignty to the United States.

Mr Justice Harlan. — Sir Charles, was there a formal renewal of the Treaties in the year he refers to, or was it an inaccurate use of the word?

Sir Charles Russell. — Well, Sir, I think it is quite correct. I read

that latter sentence for a reason that I think will justify me in the opinion of the Tribunal — That latter sentence is a complete misconception of the legal position of Great Britain in respect of the fishing rights in Behring Sea. We do not assert, we never have asserted, that Great Britain gained by her Treaties any rights in Behring Sea. Russia had no capacity to confer those rights — no power except the power of might, if she tried to exercise it and was successful, to prevent the exercise of those rights. We refer to those Treaties only to show that Russia, having asserted claims which were inconsistent with those rights, withdrew from that assertion, not that she conferred the rights upon us. The rights did not depend upon her or upon her will: they are part of the rights which belong to mankind and to all nations in common.

Then finally, following an ingenious device in argument, he winds up by seeking to put the onus on Great Britain, and asks how the ships of Canada derived a right in 1868 which they had not exercised for 90 years: upon what grounds we can defend in the year 1886 a course of conduct in the Behring Sea which had been carefully avoided ever since its discovery; and finally, by what reasoning her Majesty's Government conclude that an act may be committed with impunity against the rights of the United States which had never been attempted against the same rights when held by Russia?

I will only observe in passing that this is quite a mis-apprehension of the position in which the question is to be viewed, and that the latter one of those suggestions begs the question which was really in dispute.

Now I have only one further reference to make to this correspondence, and it is of a general nature. Several subsequent letters passed, Lord Salisbury combating, demolishing as I submit, the argument of Mr Blaine on the construction of the Treaty; and, finally, with the despatches of 17 December, 1890, the discussion on paper substantially came to an end. That despatch will be found on page 37 of the second part of the large volume. This is a still more appalling letter in point of length, because the letter itself extends from page 37 to page 56, and with its inclosures it extends, I think, to about page 64. I again have pleasure in following the judicious example of my friend Mr Carter; I will not read it. I give the same reason which I have given in reference to the previous despatch, because I have to deal with that matter as a separate argument.

The whole of this letter is conversant with the same question of justification under derivative right from Russia, with one exception, and that is the exception which is to be found in the concluding part of the letter at page 56. It is the letter which begins with that remarkable statement that my learned friends are not now prepared to endorse or to agree with, on page 37, in which Mr Blaine, a man of acuteness of mind having obviously carefully studied the question, and having at his command I presume the best legal ability which the Bar of the United States can furnish him with — and we know how high that ability is — states

that if Great Britain can show that Behring Sea was included in the phrase " Pacific Ocean " in the Treaties of 1824 and 1825, then the Secretary of State representing the United States, must admit that the United States have no well grounded complaint against her. Now this is a serious statement. It is a statement made after the matter has undergone prolonged discussion. We have now arrived at the month of December, 1890, the discussion arising out seizures which had taken place in August, 1886. Therefore, four years and some months have elapsed during which the question has been thrashed out in discussion on both sides : and, as one may naturally presume, discussed in the Cabinet Councils both in Great Britain and in America. Yet here is this statement. " Satisfy us that Behring Sea was included under the description of " Pacific Ocean " in the Treaties of 1824 and 1825, and we admit that we have no well grounded complaint against you ". I shall support that proposition of Mr Blaine in argument. It is the proposition that has to be established, that, unless there was acquiescence, or recognition, or a course of conduct which estops or binds England in relation to asserting rights in Behring Sea, if she shows that Behring Sea was in fact included in the Pacific Ocean, then she establishes two things, first of all, that Russia, if she ever made the assertion, did not persevere in it : and next, if the Treaty does include and cover Behring Sea under the phrase " Pacific Ocean " that it was a clear and distinct recognition by Russia of the rights of Great Britain to fish in Behring Sea. But there is, as I have said, one qualification upon this statement, and it is this; on the 12th September, 1888, my learned friend, Mr Phelps, had written, not to the Government of Great Britain, but to his own Government a letter which has since become important. It was not communicated to the Government of Great Britain, it lay I will not say "*perdue*", but, unnoticed apparently in the archives of the Foreign Secretary for two years and some months, and Mr Blaine, coming across it, reproduces it and hands it down to posterity in his despatch, with which I am now dealing. In introducing it, he says the United States does not claim that Behring Sea is a *mare clausum*; but he goes on to say

At the same time the United States does not lack abundant authority, according to the ablest exponents of international law, for holding a small section of the Behring Sea for the protection of the fur-seals.

What he means by that phrase, I do not know, I cannot even guess. Does he mean that the section from the line of demarcation from Behring Straits traced upon both of the maps, running west of the Pribiloff Islands and between the Commander Islands and the western end of the Aleutian Chain, — does he mean that that is a small section of Behring Sea? I do not know what he means; I do not know whether he had any real conception in his own mind of what he meant; but we have had no explanation. Then he proceeds :

Controlling a comparatively restricted area of water for that one specific pur-

pose is by no means the equivalent of declaring the sea, or any part thereof, *mare clausum*.

Lord Hannen. — May that not be connected with the proposition made in the previous paragraph, as to a circuit drawn round the island like that which was drawn with reference to Napoleon at St. Helena.

Sir Charles Russell. — That, probably, is the idea, my Lord.

Lord Hannen. — It follows it immediately afterwards.

Sir Charles Russell. — I am obliged, my Lord; that probably is the idea; but I have, however, to observe that it is inconsistent with the entire argument in the earlier part of his despatch.

Lord Hannen. — Yes. It is a fresh proposal.

Sir Charles Russell. — I was going to say, my Lord, it was a fresh proposal, probably in reference to the suggestion of the concurrence of Great Britain in Regulations. That may be the explanation of it.

Mr Justice Harlan. — The paragraph marked “ 6 ” is one of the original six questions.

Sir Charles Russell. — Yes; that is probably the explanation.

Then he proceeds to give this quotation from Mr Phelps' letter, as to which I am doing no discredit to the arguments which are advanced in the printed argument before you when I say, that upon examination that part of it which particularly refers to the supposed claim of property in the industry, and protection which it is claimed is a right incident to that property in the industry — that that argument is but an amplification of this passage from Mr Phelps' letter.

Now, I have said that that argument, amplified in the printed paper before the Tribunal, I will deal with, of course, in the appropriate order. I am not now upon it; but, before I leave it, I wish to ask the Members of the Tribunal to turn back to page 55 : about 20 lines from the bottom of that page, where this sentence occurs : —

It will mean something tangible, in the President's opinion, if Great Britain will consent to arbitrate the real questions which have been under discussion between the two Governments for the last four years.

Then he comes to an enumeration practically, if not exactly, in the form in which they stand in the Treaty of Arbitration, of the five questions being those that we have agreed to call, and properly to call, questions of exclusive right and jurisdiction.

Now, I pass from the correspondence; and I am glad to relieve the Tribunal from the necessity for any further reference at this stage to it.

HISTORY OF UNITED STATES LEGISLATION DEALING WITH ALASKA

I must now call the attention of the Tribunal to the history of United States legislation upon this question so far as it relates to this matter of the fur-seals, and in endeavouring to fix upon the book which will save

the members of the Tribunal from endless shifting about of references, I find that the 1st volume of the Appendix of the Case of the United States will be found to contain all of it.

Mr Justice Harlan. — Do you mean at page 92?

Sir Charles Russell. — I meant page 95, and I refer to page 95 for this reason — because from page 95 there are set out the Revised Statutes, some of which are previously set out in the earlier part.

Mr Justice Harlan. — I may explain to you, Sir Charles, that in 1873 went into effect what are called the Revised Statutes of the United States, the main object of which was to put, in the form of a revision the substance of the statutes already in force on the same general subjects.

Sir Charles Russell. — So I understand. I am very much obliged for the explanation, Sir. It was indeed on that understanding that I desire to refer to page 95, and I have taken the trouble to examine and to note, and I will give the date, when each of these enactments was originally passed. I will give the date when the particular provision originally became law.

The Revised Statutes
of Alaska, sec : 1954.

Now section 1954 became law on the 27th July 1868, and if I might respectfully suggest, it would not be unimportant if the date were noted opposite each of these paragraphs. Now these are the words of section 1954 :

The laws of the United States relating to customs, commerce, and navigation, are extended to and over all the mainland, islands, and waters of the territory ceded to the United States by the Emperor of Russia, by Treaty concluded at Washington on the 30th day of March, A. D. one thousand, eight hundred and sixty seven, so far as the same may be applicable thereto.

Now, no lawyer will doubt that that standing by itself is strictly a territorial statute, that that statute is one which no judge or no lawyer would construe as applying outside the limits of territorial sovereignty of the State which enacted it. Nobody will doubt that. What is doubtful on the construction of the statute itself is what is meant by “ the waters of the territory ceded ”; and it will be found in all these provisions, (whether by accident or design I know not), that there lurks a grave uncertainty, even down to the very last enactment of 1889, after the questions in controversy between the two Powers have arisen. But I am now submitting, as a lawyer to lawyers, as a matter of construction; that if this came to be construed, as to its application to foreigners not subject to the laws of the United States, no lawyer and no judge would construe it as having effect outside the territorial limits of the State. Those territorial limits of the State might, of course, include portions of water, and in some cases very considerable portions of water; but as regards territory abutting on the open sea, they could, according to international law, only extend to the marginal belt now fixed by common consent of nations at three miles.

Senator Morgan. — I do not desire, Sir Charles, to disturb you in your argument, but may I call your attention to the fact that in 1846, I

think it was, Great Britain and the United States divided the straits of Juan de Fuca, which were the open sea, and part of the North Pacific Ocean, and a sea, by the way, in which the seal herds were found, and where fishing for seal was first started — they divided it by a line which in no place approached within six miles of either coast, and in many places it is 40 miles away from either coast, and it is the boundary line between Great Britain and the United States now.

Sir Charles Russell. — I am aware of that, Sir.

Senator Morgan. — That destroyed the three-mile territorial limit, as I suppose, and substituted, in place of it, the other line.

Sir Charles Russell. — If you, Senator, think that is *ad rem* (and I say it with the unfeigned respect that I desire to pay to your observations) I will endeavor to make some kind of answer. In the first place I should require to know a little more about the precise circumstances of the water which is called the Straits of Juan de Fuca, which leave Puget Sound on the one hand and pass Victoria on the other : whether or not it came within the category of land-locked waters, and so forth.

Senator Morgan. — They are not land-locked waters.

Sir Charles Russell. — I am merely suggesting that I should require to know more about this before expressing an opinion.

Senator Morgan. — The lakes are I think.

Sir Charles Russell. — I should then require to know how far the concurrence of other nations had been given to the arrangement made between the two Powers who owned the adjoining territory; and lastly I should express the opinion, for what that opinion is worth, that if that could be properly called the “ high sea ”, and other nations were not concurring in its appropriation between these two Powers, that the effect of that treaty would be binding on these two Powers, and on these two Powers only.

Senator Morgan. — I am only speaking of the fact that the United States and Great Britain in their treaties had established the proposition that a water boundary may be established by treaty, and upon the high seas.

Sir Charles Russell. — I think it would be founding, if I may respectfully say so, Senator, a tremendous conclusion upon a very small base of premises to say that because, in that particular case, that particular treaty had been entered into, it was the affirmation of a principle of general application.

The President. — The same argument applies as to the line established between Russia and America at the moment of the cession of territory in 1867.

Sir Charles Russell. — That was as between those two : It would be binding as between those two, but if it interfered with the rights of nations on the high sea it would have no binding force or operation whatever upon them. But I beg with all deference to decline to be called upon to justify everything that the United States has claimed, or even everything that Great Britain has claimed.

Senator Morgan. — I called your attention to it because you seemed to think there was some uncertainty in the Act of Congress on the subject, whereas we consider there is absolute certainty, because we legislated according to our boundaries.

Sir John Thompson. — I think it will be found that that was not a Treaty dividing water on the high seas outside the three mile limit, but fixing the boundary line behind which you were to ascertain the respective properties of the nations; and its bearing was ascertained by its course on the high seas.

Sir Charles Russell. — I have no doubt about it. But let there be no misapprehension upon what I am now saying. I am not contesting the right of the United States to make any law it pleases over any area it pleases so far as it purports to bind only its own nationals — that is not my argument at all — I was pointing out that this would be construed to mean one which only applied to foreigners within the territorial limits of the legislative enacting Power. That was my point. But I was pointing out too the uncertainty that, on the face of the Statutes, seemed to prevail even as against their own nationals in the use of the vague words, “and waters of the territory ceded”. That is all I desire to say.

Now the next section, section 1955, was passed also in 1868, and it may be convenient to note the date on the margin of that section. It is a section which is in the nature of a revenue section. It says :

The President shall have the power to restrict and regulate or to prohibit the use of fire-arms, ammunition and distilled spirits into and within the Territory of Alaska; the exportation of the same from any port or place in the United States when destined to any port or place in that Territory, and all such arms, ammunition and distilled spirits exported or attempted to be exported from any port or place in the United States, and destined for such Territory, in violation of any regulations that may be prescribed under this section, and all such arms, ammunition and distilled spirits landed or attempted to be landed or used at any port or place in the Territory, in violation of such regulations, shall be forfeited; and if the value of the same exceeds 400 dollars. —

certain consequences are to follow. Then it goes on :

And any person wilfully violating such regulations shall be fined not more than 500 dollars or imprisoned not more than six months. Bonds may be required for a faithful observance of such regulations from the master or owners of any vessel departing from any port in the United States having on board fire-arms, ammunition or distilled spirits, when such vessel is destined to any place in the Territory or if not so destined, when there is reasonable ground of suspicion that such articles are intended to be landed there in violation of law.

And so forth.

It is a convenient opportunity to observe (without discussing it at length, which I must do a little later on) that this is a revenue enactment — an enactment for the protection of — the revenue, and the revenue laws are all aimed at the prevention of offences the completion or consummation of which involves an offence on land; it is the bringing

things into the territory against the laws of the territory; and for the enforcement of those laws a certain margin outside the three-mile limit, under the principle of what is known as the “ hovering Acts ”, is, by the common consent of a good many nations — I think it would be a little doubtful to affirm it as a principle of international law at this moment, for I think it has not reached that stage — it is simply that a number of nations have agreed to pass laws of that kind for themselves; and where they find their nationals in the case of other Powers attempting to violate those laws, they have acquiesced in their being treated as offenders against the law, and have not intervened to protect them when they believed they were intentionally endeavouring to violate the laws which they had passed.

Senator Morgan. — Probably it may become international law by long acquiescence.

Sir Charles Russell. — Probably its growth may be in that stage of gradual development to which I referred in some introductory observations which I made a few days ago.

Now Section 1956 was also passed in the year 1886. It is these terms :

No person shall kill any otter, mink, marten, sable or fur-seal or other fur-bearing animal within the limits of Alaska territory or within the waters thereof;

There still is the vagueness to which I have referred.

And every person guilty thereof shall, for each offence, be fined not less than 200 dollars nor more than 1000 dollars, or imprisonment not more than six months, or both; and all vessels, their tackle, apparel, furniture and cargo, found engaged in violation of this section shall be forfeited. But the Secretary of the Treasury shall have power to authorize the killing of any such mink, marten, sable or other fur-bearing animal, except fur-seals, under such Regulations as he may prescribe; and it shall be the duty of the Secretary to prevent the killing of any fur-seal, and to provide for the execution of the provisions of this section until it is otherwise provided by law; nor shall he grant any special privileges under this section.

Now I make the same comment in passing : there is the vagueness as regards the phrase “ within the waters of Alaska territory ”, leaving it undetermined whether it meant the whole of the waters east of the line of demarcation, or whether it meant only the ordinary three mile belt. I am not talking of bays, land-locked waters, or matters of that kind — that will be always understood; but so far as it was limited to the three-mile limit, then it was perfectly within the competence of the United States to bind foreign subjects as well as its own nationals; but if it extended further than those limits, it could have no application to foreigners at all.

Now the next section — section 1957, was also passed in 1868. It says :

Until otherwise provided by law, all violations of this chapter, and of the several laws hereby extended to the Territory of Alaska and the waters thereof, committed within limits of the same, shall be prosecuted in any district court of the United

States in California or Oregon, or in the district Courts of Washington; and the collector and deputy collectors appointed for Alaska Territory, and any person authorized in writing by either of them, or by the Secretary of the Treasury, shall have power to arrest persons and seize vessels and merchandize liable to fines, penalties, or forfeitures under this and the other laws extended over the Territory, and to keep and deliver the same to the marshal of some one of such Courts; and such Courts shall have original jurisdiction and may take cognizance of all cases arising under this Act, and the several laws hereby extended over the Territory, and shall proceed herein in the same manner and with the like effect as if such cases had arisen within the district or territory where the proceedings are brought.

I merely ask the Tribunal to take notice, in passing, that such Courts are to have *original* jurisdiction. They are “ Instance Courts ”, as they are sometimes technically called.

Section 1958 was also passed in the year 1868, and is in these terms. It is not very important :

In all cases of fine, penalty, or forfeiture, embraced in the Act approved 3rd March, one thousand, seven hundred and ninety-seven, chapter 13, or mentioned in any Act in addition to, or amendatory of such Act, that have occurred or may occur in the collection district of Alaska, the Secretary of the Treasury is authorized

to exercise the power of remission, and so on.

Now comes the first section of the legislation dealing with the Islands of St. George and St. Paul — the first legislative Act of the United States in which the Islands of St. George and St. Paul are directly dealt with, and that was passed on the 3rd March 1869.

The islands of St. George and St. Paul in Alaska are declared a special reservation for Government purposes, and until otherwise provided by law it shall be unlawful for any person to land or remain on either of those islands, except by the authority of the Secretary of the Treasury, and any person found on either of those islands, contrary to the provisions hereof, shall be summarily removed; and it shall be the duty of the Secretary of War to carry this section into effect.

I have no comment to make on that except to observe that it was entirely within the competence of the Legislature of the United States to make that provision, if it desired, binding on the whole world. It was their territory; they had the right to say who shall and who shall not land there.

Sir John Thompson. — Can you give the date of that?

Sir Charles Russell. — It became law on the 3rd March, 1869.

The next section, 1960, was passed on the 1st July, 1870. I might indeed, if I wished to divert from the line which I am upon, and if I were to follow the broad and generous lines of my friend Mr Carter's argument, have pointed out that this attempt to prohibit access of other persons, and so shut out this island from the commerce of the world, would hardly be in accordance with my friend's broad and generous conception of the duties and rights of nations; but I do not dwell on that topic.

Now section 1960 provides :

It shall be unlawful to kill any fur-seal upon the islands of St. Paul and St. George,

or in the waters adjacent thereto, except during the months of June, July, September and October in each year; and it shall be unlawful to kill such seals at any time by the use of fire arms, or by other means tending to drive the seals away from those islands, but the natives of the islands shall have the privilege of killing such young seals as may be necessary for their own food and clothing during other months, and also such old seals as may be required for their own clothing, and for the manufacture of boats for their own use; and the killing in such cases shall be limited and controlled by such regulations as may be prescribed by the Secretary of the Treasury.

Well, so far as this deals with the killing of seals upon the islands, again, of course, it is perfectly competent to bind the whole world. Of course you cannot kill seals on the land unless you are on the land or very close to it on the territorial waters; and therefore it is within the competence of the United States, by the use of the words in that section “or in the waters adjacent thereto”, construed as a Judge or a lawyer would construe them, still to mean (unless there was something in the context which showed a different meaning was intended), the marginal belt of three miles; the principle of course being, *Terræ dominium finitur ubi finitur armorum vis*.

Section 1961, passed in the year 1870, provides :

It shall be unlawful to kill any female seal, or any seal less than one year old, at any season, of the year except as above provided : and it shall also be unlawful to kill any seals in the waters adjacent to islands of St. Paul and St. George, or on the beaches, cliffs, or rocks where they haul up from the sea to remain ; and every person who violates the provisions of this or the preceding section shall be punished for each offence—

And so on.

I make as to that the same comment which I made with regard to the previous section.

Section 1962, which was also passed in 1870, is in these terms :

For the period of 20 years from the first July, one thousand eight hundred and seventy, the number of the fur-seals which may be killed for their skins upon the island of St. Paul is limited to seventy-five thousand per annum; and the number of fur-seals which may be killed for their skins upon the island of St. George is limited to twenty-five thousand per annum.

But the Secretary of the Treasury may limit the number. There is no objection to that; it is quite within the competence of the Legislature.

Section 1963 was also passed in the year 1870; and this becomes a little important :

When the lease heretofore made by the Secretary of the Treasury to the Alaska Commercial Company of the right to engage in taking fur-seals on the islands of St. Paul and St. George pursuant to the act of the 1st July 1889 —

I do not know what that Act is. I think we have not got it — how ever it is not important.

General Foster. — It is the Act authorising the lease.

Sir Charles Russell. — I thank you; that I gather ed; but I think it is not set out.

General Foster. — Not here.

Sir Charles Russell. — It was the first Act authorising the lease :

When any future similar lease expires, or is surrendered, forfeited or terminated, the Secretary shall lease to proper and responsible parties, for the best advantage of the United States, having due regard to the interests of the Government, the native inhabitants, their comfort, maintenance, and education, as well as to the interests of the parties heretofore engaged in trade, and the protection of the fisheries, the right of taking fur seals on the islands herein named, and of sending a vessel or vessels to the islands for the skins of such seals, for the term of twenty years at an annual rental of not less than fifty thousand dollars, to be reserved in such lease and secured by a deposit of the United States bonds to that amount; and every such lease shall be duly executed in duplicate and shall not be transferable.

Mr Justice Harlan. — Sir Charles, if I might interrupt you for a moment, you read that as if it referred to an Act passed in 1889. It is *Chapter 1889*, and the Act of the first July 1870. No doubt you will find that provision in the act of 1870.

Sir Charles Russell. — I think very likely you are right, Sir. I misread the chapter for the year. Now section 1964 says :

The secretary of the Treasury shall take from the lessees of such islands in all cases a bond —

And so on. I need not trouble about that.

Then section 1965, passed in the same year, says :

No persons other than American citizens shall be permitted, by lease or otherwise, to occupy the islands of St Paul or St George, or either of them, for the purpose of taking the skins of fur-seals therefrom, nor shall any foreign vessels be engaged in taking such skins; and the Secretary of the Treasury shall vacate and declare any lease forfeited if the same be held or operated for the use, benefit or advantage, directly or indirectly, of any person other than American citizens.

I am afraid with regard to this provision the idea of trusteeship for the benefit of mankind was not quite present to the mind of the framer of this particular provision.

Now section 1966, which was also passed in the year 1870, says :

Every lease shall contain a covenant on the part of the lessee that he will not keep, sell, furnish, give or dispose of any distilled spirits or spiritous liquors —

I need not trouble you with that.

Now section 1967, passed also in the year 1870, provides :

Every person who kills any fur-seal on either of those islands, or in the waters adjacent thereto, without authority of the lessess thereof, and every person who molests, disturbs, or interferes with the lessees, or either of them, or their agents or employés in the lawful prosecution of their business, under the provisions of this chapter, shall for each offense be punished as prescribed in section nineteen hundred and sixty-one; and all vessels, their tackle, apparel, appartenances and cargo, whose crews are found engaged in any violation of the provisions of the sections nineteen hundred and sixty five to nineteen hundred and sixty eight, inclusive, shall be forfeited to the United States.

Senator Morgan. — What is the penalty attaching to the provision in the last sentence that you read Sir Charles?

Sir Charles Russell:

Every person who kills any fur seal on either of those islands or in the waters adjacent thereto, without authority of the lessees thereof —

Senator Morgan. — The last clause.

Sir Charles Russell.

And every person who molests, disturbs, or interferes with the lessees, or either of them, or their agents or employés in the lawful prosecution of their business under the provisions of this chapter, shall for each offence be punished as prescribed in section nineteen hundred and sixty one; and all vessels, their tackle apparel, and appurtenances, and cargo, whose crews are found engaged in any violation of the provisions of sections nineteen hundred and sixty-five to nineteen hundred and sixty eight, inclusive, shall be forfeited to the United States.

Senator Morgan. — The forfeiture applies to all those offences?

Sir Charles Russell. — Yes.

Senator Morgan. — I am mistaken. I thought it applied only to the killing of female seals.

Sir Charles Russell. — Not at all, Sir; this section makes it an offence to kill any fur seal on either of the Islands without the assent of the lessees. It makes it an offence to kill any fur seal “in the waters adjacent thereto” — whatever those words mean. It makes it an offence also for any person to molest, disturb or interfere with the lessees in the lawful prosecution of their business; and it attaches to all those offences the consequences to be found in the sections referred to, which include fine and imprisonment; and it also attaches the further sanction and penalty that the vessels, apparel, and so on, shall be forfeited to the United States.

I need not point out this is a very wide reaching section, perfectly within the competence, again, of the United States to pass, so as to bind its own nationals, perfectly competent for the United States to pass so as to bind all within the extent of its territorial dominion, but not beyond.

Senator Morgan. — Would it be competent to treat it as a hovering Act, to prevent an offence against the revenue?

Sir Charles Russell. — Certainly, if an offence is contemplated to be committed on the territory, which is the principle of the revenue Acts, certainly, within the limitations and qualifications which I shall have to explain when I deal with that subject. Applied, as you will see this municipal law has been applied, it means this, that anyone who kills a fur-seal any where east of the line which has been called, for brevity, the line of demarcation, is (as it has been construed) liable to fine, imprisonment, and to the forfeiture of the ship to the United States. Section 1968 which was also passed in 1870, is :

If any person or Company, under any lease herein authorized, knowingly kills or permits to be killed any number of seals —

and so on, there are penalties. Then section 1969, also passed in 1870 is

In addition to the annual rental required to be reserved in every lease —

there is the annual tax or duty of two dollars on each fur skin.

Then section 1970, also passed in 1870, provides.

The Secretary of the Treasury may terminate any lease given to any person, company or corporation, on full and satisfactory proof of the violation of any of the provisions of this chapter, or the regulations established by him.

that is, the Secretary of the Treasury. Then section 1971.

The lessees shall furnish to the several masters of vessels employed by them certified copies of the lease, which shall be presented to the Government revenue officer.

I need not read that. And then section 1972,

Congress may, at any time hereafter, alter, amend, or repeal, sections from 1960 to 1971, both inclusive, of this chapter.

That is to say, to turn back for one moment, section 1960 is the one which makes it unlawful to kill any fur-seal on the islands or in the waters adjacent thereto except in particular months : Section 1961 makes it unlawful to kill any female seal — those are the particular sections of importance : Congress may alter or repeal those sections, a provision which I do not myself appreciate. I should suppose it was always in the competence of the Legislature, by a subsequent provision, to repeal them.

Mr Justice Harlan. — I can tell you briefly the history of those words in our Statutes.

Sir Charles Russell. — It would be interesting, Sir, no doubt.

Mr Justice Harlan. — Our Constitution says that no State shall pass a law impairing the obligation of contracts, but these provisions are not applicable to Acts of Congress. The words referred to by Counsel were inserted to avoid any question of the Legislature divesting vested rights. Charters frequently reserve the right to alter or amend, to prevent any question being raised that subsequent legislation deprived a party of vested rights.

Sir Charles Russell. — The next section became law on the 5th March, 1872, and that is section 1973.

Mr Gram. — When was section 1972 made law?

Sir Charles Russell. — That became law in 1870. By section 1973 the Secretary of the Treasury is authorized to appoint one agent and three assistant agents; and by section 1974, also passed in 1872, they are to receive a certain amount of pay. By section 1975 the agents are not to be interested in any lease, and by section 1976 they are empowered to administer oaths. All those sections were passed in 1872, but they are not very material.

Now the next legislative Act is Chapter 64, on page 99 of this volume. It became law on the 24th March 1874, and it provides that

An Act to amend the Act intituled “ an Act to prevent the extermination of fur-bearing animals in Alaska ”, approved July 1st 1870, is hereby amended, so as to

authorize the secretary of the Treasury, and he is hereby authorized to designate the months in which fur seals may be taken for their skins on the Islands of St. Paul and St George in Alaska, and in the waters, adjacent thereto, and the number to be taken on or about each island respectively.

Now up to this time the Tribunal will perceive that two expressions have been used. So far as regards water, which is the point in question, in describing the extent of the application of the legislation in the Statute of 1868, the laws relating to commerce and to navigation — I do not stop to observe upon the consequences of this extension of the laws of commerce — are extended among other things over all the mainland, islands and waters of the territory ceded. That is one expression; but in every subsequent enactment down to 1889, which I have not yet touched upon, the words are “ and waters adjacent thereto ”. It stands thus : “ the law is to extend to the mainland, islands and waters of the territory ceded ”; and the alternative expression is “ waters adjacent thereto ”.

Now, in 1889, an important Act was passed; and, before I call attention to this legislation, I ask permission for one moment, because it is matter of interest and, I think, not without importance, to show what was the state of opinion in America among its most distinguished and influential citizens and legislators upon this subject of public fishing rights in waters adjoining a particular territory. I mention it here, as I always try to do, in the order of time. We have got now to the eve of the legislation of 1889. There was then existing another dispute between Great Britain and the United States. Of course, there is an eastern as well as a western coast of America, and the question arose as to what were the rights of the United States to fish in the waters adjoining Canadian territory, Newfoundland, and so forth; and there was a certain amount of friction existing between the two nations on the subject, and a distinguished English Statesman, Mr Chamberlain, was despatched in 1888 upon a pacific mission to America. The matter finally resolved itself into a very small and fine point. The general rule as to the three miles from the shore as an international principle was hardly in question; but the point arose how it was to be applied in the case of embayed waters. On the part of Canada, it was claimed that, where the bay ran to a considerable extent into the territory of Canada, that the Canadians should have exclusive rights even if the mouth of the bay was more than 6 miles wide, that is to say if it was of greater width than it could be protected by the *vis armorum* — three miles on each side. They contended for a wider application. That was resisted by the United States; they claimed that they had the right to enter any bay which was wider at its mouth than six miles, and had the right to fish up to within 3 miles of the coast of that bay, following from point to point the sinuosities of the bays; and, finally, the majority of the Senate recommended, for the settlement of the differences, that the limits should be fixed at 10 miles; that is to say, that wherever at the mouth of the bay the land

Statute of 1884

approached within 10 miles, the exclusive right should be considered as belonging to the Power owning the territory. The matter came to be discussed in Committee, and among the influential Members of the Committee was one of your distinguished body; and he, with three other gentlemen, signed a minority report. The signatures are those of John T. Morgan, Eli Salisbury, Joseph E. Brown, and H. B. Payne; and their argument was a very sensible one; they did not want this restricted limit. I am reading from the Senate "Miscellaneous Documents", 1st session, 50th Congress, Volume 2, page 65. The gentlemen who formed this minority had very wisely in their minds the fact that I have mentioned, that this great Power, the United States, has interests on both sides, west and east; and this is the language they use in their Report :

A vast extent of the coast of the Pacific reaching to the Arctic Circle, and destined to become a more important fishing ground than the Atlantic coasts, must be affected by the principles of international law which the United States shall assert as defining the limits seaward from the coast of our exclusive right to fish for seals and sea otters and whales, and the many varieties of food fishes that swarm along the coast of Behring Sea and the Straits. We might find in that quarter a very inconvenient application of the doctrine that by the law of nations the three mile limit of the exclusive right to fishery is to follow and be measured from the sinuosities of the coasts of the bays, creeks and harbours that exceed six miles in width at the entrance, and an equally inconvenient application of our claim for full commercial privileges in Canadian Ports for our fishermen when applied to British Columbian fisherman in our Pacific Ports, which are nearer to them than to our fisheries in Alaska.

There is a great deal of weight, I need not say, looking to the source from which it comes, in that statement; but I call attention to it in view of the broad suggestion which is now propounded, that at the very time that these statesmen were considering this matter in 1888, the United States asserted that she had, first of all, under her title from Russia, and next as inherent in her right of territorial dominion, the right of stretching out its arm of authority over the whole of Behring Sea and to exclude others from the pursuit of seals and sea-otters and whales, — and I do not see why it should stop at fur-seals or at the many varieties of food fishes that swarm along the coast of Behring Sea and the straits, — I say this is very strong evidence, indeed, that that principle of international law to which we have adverted was a principle recognized by the public men of authority in the United States; but that what this minority was struggling against, — and in the point of view of international interests I do not complain of their struggling against it — was a limitation in the application of principle on the east coast of America which might conflict with some interests they would feel bound to assert or feel justified in asserting on the other coast.

Senator Morgan. — That treaty was rejected by the Senate.

Sir Charles Russell. — It was, quite true, as I am glad to be reminded by the Senator. They took the narrow line. They were for close and strict limitation.

Now, before I call the attention of the Tribunal to this Statute of 1889, as to which I must make some comment, I wish to give its history. It is not long, and if the Tribunal will turn to the original Case of Great Britain, the history there begins on page 123. I hope I need not remind the Tribunal of the point to which all this discussion is tending. I am upon the question of seizures, and I am pointing out that the seizures were based upon municipal legislation and upon municipal legislation alone; and I want to demonstrate only that the theory which is now put forward was never dreamt of until at a later stage of the discussion some ingenious mind suggested it.

In 1889, what was the state of things, to begin with? The state of things was this; that three years before, namely in 1886, vessels of subjects of the Queen had been seized for fur-sealing in Behring Sea; that those seizures had been repeated in 1887; that there had been no seizures in 1888; I think that seizures were further repeated in 1889. Now that was the state of the case; and you have seen from the diplomatic correspondence up to that time what was the attitude and the justification of the United States. I will read from the Case, p. 123.

During the fiftieth session of the House of Representatives, in 1889, the Committee on Marine and Fisheries was directed « to fully investigate and report upon the nature and extent of the rights and interests of the United States in the fur-seals and other fisheries in the Behring Sea in Alaska, whether and to what extent the same had been violated, and by whom; and what, if any, legislation is necessary for the better protection and preservation of the same! »

The Committee reported, upholding the claim of the United States to jurisdiction over all waters and land included in the geographical limits stated in the Treaty of Cession by Russia to the United States. —

Senator Morgan. — That was a House Committee, was is not?

Sir Charles Russell. — Yes; it is called a Committee of the House of the Representatives. I need not stop to point out that that was an assertion of territorial dominion over that area.

The Committee reported, upholding the claim of the United States to jurisdiction over all waters and land included in the geographical limits stated in the Treaty of Cession by Russia to the United States, and construing different Acts of Congress as perfecting the claim of national territorial rights over the open waters of Behring Sea everywhere within the above-mentioned limits.

The Report states :

« The territory of Alaska consists of land and water. Exclusive of its lakes, rivers, harbours, and inlets, there is a large area of marine territory which lies outside of the three-mile limit from the shore, but is within the boundary-lines of the territory transferred by Russia to the United States. »

And the Report concludes thus :

« That the chief object of the purchase of Alaska was the acquisition of the valuable products of Behring Sea.

I need not point out that the fur-seal is not the only valuable product of the Behring Sea, and that that is an assertion of territorial dominion and

sovereignty, which, of course, carries with it, if well-founded, the exclusive right to take the products, whatever they are, of that Sea.

“ That at the date of the cession of Alaska to the United States, Russia’s title to Behring Sea was perfect and undisputed.

“ That, by virtue of the Treaty of Cession, the United States acquired complete title to all that portion of Behring Sea situated within the limits prescribed by the Treaty.

“ The Committee herewith report a bill making necessary amendments of the existing law relating to these subjects, and recommend its passage.”

It then proceeds to describe the amendments, as declaring the true intent and meaning of section 1956. That, the Tribunal will remember, is the section which prohibits the killing of any otter, mink, marten, sable, or fur-seal or other fur-bearing animal within the limits of Alaska territory or in the waters thereof :

“ That section 1956 was intended to include and apply, and is hereby declared to include and apply, to *all the waters of Behring Sea in Alaska embraced within the boundary-lines mentioned and described in the Treaty with Russia*, dated the 30th March, A. D. 1867, by which the Territory of Alaska was ceded to the United States; and it shall be the duty of the President at a timely season in each year to issue his Proclamation, and cause the same to be published for one month in at least one newspaper published at each United States’ port of entry on the Pacific coast, warning all persons against entering said Territory and waters for the purpose of violating the provisions of said section; and he shall also cause one or more vessels of the United States to diligently cruize said waters and arrest all persons, and seize all vessels found to be, or to have been, engaged in any violation of the laws of the United States therein.

The Bill, Mr President, did not pass the House of Representatives, but this section was added by the House as an amendment to a Bill for the protection of the salmon fisheries of Alaska, which originated in the Senate.

The Senate however refused to accept the amendment of the other House, and the Bill was accordingly referred to a Conference of the Houses, and the section, as finally modified and adopted in the Act of the 2nd March 1889, reads as follows :

This is as it stands in the book at page 99, and it will be observed that it did not pass the legislative bodies and ultimately become law in the terms in which it was recommended : those terms being that it should apply “ to all the waters of Behring Sea in Alaska embraced within the boundary-lines mentioned and described in the Treaty with Russia ”. The earlier statute runs thus : “ The laws... are extended to and over all the main-land, islands and waters of the territory ceded to the United States by the Treaty with Russia ”; and the section as it was actually passed runs as follows :

That S. 1956... is hereby declared to include and apply to all the dominion of the United States in the waters of Behring Sea.

Now I really have to ask, what was the reason of the change? Was it intended that the change should mean anything, or was it intended that it should mean nothing?

Was it intended to be left in a position in which, without asserting

dominion over all the waters of Behring Sea, it should yet be so vaguely framed that the executive authority would be entitled to invoke an interpretation of it as if it included all the waters of the Behring Sea as part of the dominion belonging to Alaska territory? In this discussion also one of your Tribunal took part, and, as the Tribunal would be prepared to expect, a sensible part. First of all, instead of being a substantive Act dealing with this question, it is smuggled into (if I may use the expression) an Act dealing with an entirely different matter — an Act for the protection of the Salmon Fisheries of Alaska; and when it came up, Mr Senator Morgan (I now refer to page 249 of vol. III of the Appendix to the Case of Great Britain) says :

I wish to say just this : That in the Report made by the Committee the rights of the Government of the United States were not considered, and not intended to be considered. We only arrive at the conclusion that the question presented in the amendment of the House is of such a serious and important a character that the Committee on Foreign Relations would not undertake at this time to pronounce that kind of judgment upon it which is due to the magnitude of such a question.

Very wise words.

I desire that the Bill as it passed the Senate originally should pass,

That is the Salmon Fisheries Bill.

because it protects the salmon and other fisheries in Alaska, about which there is no dispute; but this particular question is one of very great gravity and seriousness, and the Committee on Foreign Relations, or at least a majority of the entire Committee, did not feel warranted in undertaking to consider it at this time.

Mr Justice Harlan. — I think those observations of Mr Sherman following that are important.

Sir Charles Russell. — I will read them by all means.

Senator Morgan. — I should like to say this, that we were then in full course of negotiations with Great Britain for the settlement of these disputed questions, and it was submitted by the Committee of Foreign Relations to the Senate that that diplomatic effort should not be obstructed by summary legislation.

Sir Charles Russell. — I think nobody can doubt the perfect wisdom of that view which operated upon your mind, but it did not operate apparently upon that of the majority of the legislative body.

The point is not what individual Senators, however wise and eminent, held in the matter, but what the Legislature has done; and that I am now proceeding to consider. But in answer to Mr Justice Harlan, I will of course, read, Mr Sherman's speech.

General Foster. — He was chairman of the Committee.

Sir Charles Russell. — I am much obliged.

I intended, when the amendment was properly before us, to say to the Senate that the Committee on Foreign Relations were of the opinion that while there was no objection at all to the Senate Bill as it passed [that is the Salmon Fisheries Bill] it being for a clear and plain purpose, the question proposed by the House in the form of an amendment was a grave one, and had no relation to the subject-

matter of the Bill, and ought not to be connected with it, had no connection really with it, and involved serious matters of international law, perhaps, and of public policy, and therefore it ought to be considered by itself.

I was directed by the Committee to state that the subject-matter, the merits of the proposition proposed by the House, were not before us, and not considered by us, and we are not at all committed for or against the proposition made by the House. We make this Report simply because it has no connection with the Bill itself, and it ought to be disagreed to and abandoned, and considered more carefully hereafter. I, therefore, ask for a Committee of Conference on the disagreeing votes of the two Houses.

Ultimately it was passed in the form in which it stands on page 99.

“ That section 1956 of the Revised Statutes of the United States is hereby declared to include and apply to all the dominion of the United States in the waters of Behring Sea, and it shall be the duty of the President, at a timely season in each year, to issue his Proclamation, and cause the same to be published. ”

Senator Morgan. — The word “ dominion ” used in that statute, I beg leave to say, Sir Charles, is the word used in the Treaty. Of course its signification as that statute has presented it must, in the absence of an interpretation by the Legislature, depend on the judgment of the courts as to what dominion included.

Sir Charles Russell. — I do not know whether the Tribunal heard that. It is not without some consequence perhaps. The learned Senator has said that that word “ dominion ” as introduced in that section is so introduced because it is found in the Treaty of 1867. I beg leave to observe, with great deference to the learned Senator, that when I come to deal with that Treaty of 1867 it will be found that there is no such word in it as “ dominion ”, that it has been changed in the translation, and that “ rights of sovereignty,” which is the expression in the treaty, has been incorrectly interpreted in the English version into the word “ dominion. ”

Senator Morgan. — I never heard that, as to the word “ dominion ”, there was a mistranslation of the treaty. I understand the Treaty was drawn up in English and French.

Sir Charles Russell. — I think not, sir, with great deference.

Mr Justice Harlan. — Yes. Here it is in French on page 76.

Mr Foster. — It is in English and in French. The United States Government never makes a Treaty in a foreign language.

Senator Morgan. — The word “ dominion ” was used.

Sir Charles Russell. — In my judgment the point is not a material one, but as matter of fact when I come to deal with that Treaty I will point out the construction that is erroneously placed upon some words in that Treaty, judged at least by the French original. I do not myself consider that the word is one of importance. It is a mere matter of translation.

My point upon this Statute of 1885, of course, is that it is a piece of *ex post facto* legislation, which purports to extend the operation of the earlier Acts. It is declaratory of the meaning of those earlier Acts, but

it substitutes words much wider in their scope and capable of being interpreted to mean, and I think what I have read shows they were intended to mean, the assertion of dominion, of territorial sovereignty, over the waters of Behring Sea within the limits of the Treaty of session of 1867; therefore, the particular question to which Senator Morgan has been good enough to draw my attention would not in that connection be material.

So much for the statutes. Now still pursuing the same line to which I am closely adhering, and demonstrating to this Tribunal that as against British subjects the municipal law alone was invoked and put into operation, I have to say that there was no suggestion at any place, or at any time, or by any person, of that which one would have expected, if such a case had been in the minds of the Executive, and which must have been put forward in the simplest form thus : We are proceeding against your subjects for violation not of our municipal law, but merely in pursuance of that inherent right which we have to protect our property and our interests, wherever that property or those interests may be injuriously affected.

Now I wish to make this matter clear beyond all possibility of doubt ; and one therefore naturally turns to see what were the grounds upon which those representing the United States Executive invoked the authority of their municipal courts and claimed sentence of imprisonment, fine and confiscation. For that purpose, of course, one naturally turns to the pleadings in the case.

PROCEEDINGS IN THE ALASKAN COURT.

The case is presented to the Court, and it must be dealt with by the Court *secundum allegata et probata*. Accordingly I turn to page 65 of Volume III of the Appendix to the British Case. On that page will be found the libel :

IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF ALASKA.

The United States, Libellant, v. The Schooner " Thornton ", her Tackle, etc. — On Libel of Information for being engaged in the Business of killing Fur-seal in Alaska.

Transcript of Record.

On the 28th day of August, 1886, was filed the following Libel of Information :

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.
AUGUST SPECIAL TERM, 1886.

To the Honourable Lafayette Dawson, Judge of said District Court :

The libel of information of M. D. Ball, Attorney for the United States for the District of Alaska, who prosecutes on behalf of said United States, and being present here in Court in his proper person, in the name and on behalf of the said United States, against the schooner " Thornton ", her tackle, apparel, boats, cargo

and furniture, and against all persons intervening for their interest therein, in a cause of forfeiture, alleges and informs as follows :—

That Charles A. Abbey, an officer in the Revenue Marine Service of the United States, and on special duty in the waters of the district of Alaska, heretofore, to wit, on the 1st day of August, 1886, within the limits of Alaska territory, and in the waters thereof, and within the civil and judicial district of Alaska, to wit, within the waters of that portion of Behring Sea belonging to the said district, on waters navigable from the sea by vessels of 10 or more tons burden, seized the ship or vessel, commonly called a schooner, the “ Thornton ”, her tackle, apparel, boats, cargo, and furniture, being the property of some person or persons to the said Attorney unknown, as forfeited to the United States, for the following causes :—

That the said vessel or schooner was found engaged in killing fur-seal within the limits of Alaska Territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States.

And the said Attorney saith that all and singular the premises are and were true, and within the Admiralty and maritime jurisdiction of this Court, and that by reason thereof, and by force of the Statutes of the United States in such cases made and provided, the afore-mentioned and described schooner or vessel, being a vessel of over 20 tons burden, her tackle, apparel, boats, cargo, and furniture, became and are forfeited to the use of the said United States, and that said schooner is now within the district aforesaid.

Wherefore the said Attorney prays that the usual process and monition of this honourable Court issue in this behalf, and that all persons interested in the before-mentioned and described schooner or vessel may be cited in general and special to answer the premises, and all due proceedings being had, that the said schooner or vessel, her tackle, apparel, boats, cargo, and furniture may, for the cause aforesaid, and others appearing, be condemned by the definite sentence and decree of this honourable Court, as forfeited to the use of the said United States, according to the form of the Statute of the said United States in such cases made and provided.

M. D. BALL,

United States District Attorney for the District of Alaska.

That libel was amended and appears in its amended form on page 71, at the bottom of the page. It is not amended in any matter material for this purpose, except so as to bring the men as persons under the cognizance of the court. They were afterwards subjected, as you know, to fine and imprisonment; which has also an important bearing as to whether it was under municipal law or not that these proceedings were founded.

Then there is a demurrer, at the bottom of page 72 :

1. The said claimant by protestation, not confessing all or any of the matters in said amended information contained to be true, demurs thereto and says that the said matters in manner and form, as the same are in the information stated and set forth, are not sufficient in law for the United States to have and maintain their said action for the forfeiture of the property aforesaid.;

2. The said claimant by protestation denies that this Court has jurisdiction to determine or try the question hereby put in issue.

3. And that the said claimant is not bound in law to answer the same.

That demurrer was overruled. I do not think I need trouble you with it.

Senator Morgan. — Was there an intervention of the owner in that case?

Sir Charles Russell. — Yes, of the owner or the person interested ; I think the owner. I wish to go over all these, so that I need not have to recur again to the pleadings in the other cases. I am merely giving the “Thornton” as a sample case in 1886. The others were similar.

I will now turn to page 112 of that large volume, which relates to the later seizures.

The President. — Your point is that the prosecution was always had under section 1956?

Sir Charles Russell. — Yes, sir. I find I ought to refer the Tribunal for one moment to the beginning of the proceedings in the “Sayward” case, as they were similar to the later prosecutions. It is on page 83, at the bottom of the page, vol. III :

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

United States v. Geo. R. Ferry and A. Laing. — Information.

DISTRICT OF ALASKA, SS.

George R. Ferry and A. Laing are accused by M. D. Ball, United States District Attorney for Alaska, by this information, of the crime of killing fur seals within the waters of Alaska Territory, committed as follows :

The said George R. Ferry and A. Laing on the 8th day of July, A. D. 1887, in the District of Alaska and within the jurisdiction of this Court, to wit, in Behring's Sea, within the waters of Alaska Territory, did kill ten fur seals, contrary to the Statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

Dated at Sitka the 23rd day of July, 1887.

I need not trouble you with the pleadings, which were based upon the same line; but I now proceed to show the grounds upon which the judgment of condemnation of the court was invoked, and that will be found at page 112, these being the grounds filed in the Court, and presented as the case of the United States, upon which the demand for judgment was based. It appears that we have got these proceedings from *The New-York Herald* of October 18, 1887. You will see at the bottom of page 112 a not unimportant statement. *The New-York Herald* is an important paper published, as you know, in New-York, and indeed I may say in Paris also :

The Government here are in receipt of advices from Sitka, which contain the brief which is understood to have been prepared at Washington and recently filed in the Court at Sitka by Mr A. K. Delaney, as counsel for the United States Government.

Therefore it was under high auspices.

Mr Foster. — That is a despatch from Ottawa, published in the *Herald*.

Sir Charles Russell. — There is no doubt about the fact, but if my friend intimates to me that he has any doubt about the fact I will pursue the evidence that shows it.

Mr Foster. — I am simply calling attention to the fact that the despatch originates from Ottawa, Canada.

Sir Charles Russell. — It does not matter very much where it originates.

The President. — You mean, as a matter of fact, that the pleading was prepared at Washington?

Sir Charles Russell. — Precisely. Mr President I would ask you to kindly allow my friend Sir Richard Webster to read the whole of this, as it is one of the few documents I shall desire to read *in extenso*.

Senator Morgan. — Is that a brief in the case?

Sir Charles Russell. — Yes; it is the formal pleading filed at Sitka on behalf of the United States.

Senator Morgan. — It is not a brief then; it is a part of the case?

Sir Richard Webster. — In the pleadings in those Courts both sides file a brief in the Court itself; it is not the same thing as a brief of counsel.

Sir Richard Webster thereupon read to the Court the following verbatim copy of the brief :

Case.

The information in this case is based on Section 1936 of Chapter 3 of the Revised Statutes of the United States, which provides that, 'No person shall kill any otter, mink, martin, sable or fur-seal, or other fur-bearing animal within the limits of Alaska Territory or in the waters thereof.'

The offence is charged to have been committed 130 miles north of the Island of Ounalaska, and therefore in the main waters of that part of Behring's Sea ceded by Russia to the United States by the Treaty of 1867. The defendants demur to the information on the ground.

1. That the Court has no jurisdiction over the defendants, the alleged offence having been committed beyond the limit of a marine league from the shores of Alaska.

2. That the Act under which the defendants were arrested is unconstitutional in so far as it restricts the free navigation of the Behring's Sea for fishing and sealing purposes beyond the limits of a marine league from shore. The issue thus raised by the demurrer presents squarely the questions :

- (1) The jurisdiction of the United States over Behring's Sea.
- (2) The power of Congress to legislate concerning those waters.

The argument.

The fate of the second of these propositions depends largely upon that of the first, for if the jurisdiction and dominion of the United States as to these waters be not sustained the restrictive Acts of Congress must fall, and if our jurisdiction shall be sustained small question can be made as to the power of Congress to regulate fishing and sealing within our own waters. The grave question, one important to all the nations of the civilized world, as well as to the United States and Great Britain, is "the dominion of Behring's Sea."

The Three Mile Limit.

Concerning the doctrine of international law establishing what is known as the marine league belt, which extends the jurisdiction of a nation into adjacent seas for the distance of 1 marine league, or 3 miles from its shores, and following all the indentations and sinuosities of its coast, there is at this day no room for discussion. It must be accepted as the settled law of nations. It is sustained by the highest authorities, law-writers, and jurists. It has been sanctioned by the Uni-

ted States since the foundation of the Government. It was affirmed by Mr Jefferson, Secretary of State, as early as 1793, and has been reaffirmed by his successors — Mr Pickering, in 1796; Mr Madison, in 1807; Mr Webster, in 1842; Mr Buchanan, in 1849; Mr Seward, in 1862, 1863, and 1864; Mr Fish, in 1875; Mr Evarts, in 1879 and 1881; and Mr Bayard, in 1886. (Wheaton's International Law., vol. I, sec. 32, pp. 100 and 109.)

Sanctioned thus by an unbroken line of precedents covering the first century of our national existence, the United States would not abandon this doctrine if they could; they could not if they would.

Landlocked Seas.

Well grounded as is this doctrine of the law of nations, it is no more firmly established as a part of the international code than that other principle which gives to a nation supremacy, jurisdiction, dominion over its own inland waters, gulfs, bays, and seas. If a sea is entirely enclosed by the territories of a nation, and has no other communication with the ocean than by a channel, of which that nation may take possession, it appears that such a sea is no less capable of being occupied and becoming property than the land, and it ought to follow the fate of the country that surrounds it. The Mediterranean in former times was absolutely inclosed within the territories of the Romans, and that people, by rendering themselves masters of the strait which joins it to the ocean might subject the Mediterranean to their Empire, and assume the dominion over it. They did not by such proceeding injure the rights of other nations, a particular sea being manifestly designed by nature for the use of the countries and nations that surround it. (Vattel's Law of Nations, pp. 129 and 130).

Chancellor Kent, in 1826 before the doctrine as to the marine league limit was as firmly established as it now is, says :

‘ It is difficult to draw any precise or determined conclusion amid the variety of opinions as to the distance a State may lawfully extend its exclusive dominion over the seas adjoining its territories and beyond those portions of the sea which are embraced by harbours, gulfs, bays, and estuaries, and over which its jurisdiction unquestionably extends. ’ (Kent, vol. I, p. 28).

Jurisdiction of States.

It thus appears that, while in 1826 the limit of the marine belt was unsettled, the jurisdiction of a state over its inland waters was unquestioned.

‘ In the laws of nations bays are regarded as a part of the territory of the country when their dimensions and configurations are such as to show that the nation occupying the coast also occupies the bay as a part of its territory. (Manning's Law of Nations, p. 120).

‘ An inland sea or lake belongs to the state in which it is territorially situated. As illustrations, may be mentioned the inland lakes whose entire body is within the United States, and the Sea of Azof. ’ (Wheaton's International Law, vol. I, sec. 31).

‘ Rivers and inland lakes and seas, when contained in a particular State, are subject to the Sovereign of such State. ’ (Idem, vol. III, sec. 300).

‘ Undoubtedly it is upon this principle of international law that our right to dominion over such vast inland waters as the Great Lakes, Boston Harbor, Long Island Sound, Delaware and Chesapeake Bays, Albemarle Sound, and the Bay of San Francisco rests. This country, in 1793, considered the whole of Delaware Bay to be within our territorial jurisdiction, and it rested its claim upon these authorities, which admit that gulfs, channels, and arms of the sea belong to the people within whose land they are encompassed. ’ (Kent's Com. vol. I, p. 528.)

The Doctrine Always Asserted.

It thus appears that our Government asserted this doctrine in its infancy. It was announced by Mr Jefferson as Secretary of State, and by the Attorney General in 1793. Mr Pickering, Secretary of State in 1796, reaffirms it, in his letter to the

Governor of Virginia, in the following language : ‘ Our jurisdiction has been fixed to extend 3 geographical miles from our shores, with the exception of any waters or bays which are so land-locked as to be unquestionably within the jurisdiction of the states, be their extent what they may. ’ (Wheaton’s International Law, vol. I sec. 32, pp. 2—100.)

Mr Buchanan, Secretary of State to Mr Jordan, in 1849 reiterates this rule in the following language : ‘ The exclusive jurisdiction of a nation extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea enclosed by head lands. ’ (Idem p. 101.)

Mr Seward, in the Senate in 1852, substantially enunciates the same doctrine by declaring that if we relied alone upon the old rule that only those bays whose entrance from headland to headland do not exceed six miles are within the territorial jurisdiction of the adjoining nation, our dominion to all the larger and more important arms of the sea on both our Atlantic and Pacific Coasts would have to be surrendered. Our right to jurisdiction over these rests with the rule of international law which gives a nation jurisdiction over waters embraced within its land dominion.

Behring’s Sea Inland Water.

It thus appears that from our earliest history, contemporaneously with our acceptance of the principle of the marine league belt, and supported by the same high authorities is the assertion of the doctrine of our right to dominion over our inland waters under the Treaty of 1867, and on this rule of international law we base our claim to jurisdiction and dominion over the waters of the Behring Sea. While it is, no doubt, true that a nation cannot by treaty acquire dominion in contravention of the law of nations, it is none the less true that, whatever title or dominion our grantor, Russia, possessed under the law of nations at the time of the treaty of cession in 1867, passed and now rightfully belongs to the United States. Having determined the law, we are next led to inquire as to whether Behring’s Sea is an inland water or a part of the open ocean, and what was Russia’s jurisdiction over it.

Behring’s Sea is an inland water. Beginning on the eastern coast of Asia, this body of water, formerly known as the Sea of Kamchatka, is bounded by the Peninsula of Kamchatka and Easter Siberia to the Behring’s Strait. From the American side of this strait the waters of the Behring’s Sea wash the coast of the mainland of Alaska as far south as the Peninsula of Alaska. From the extremity of this peninsula, in a long, sweeping curve, the Aleutian Islands stretch in a continuous chain almost to the shores of Kamchatka, thus encasing the sea.

Russia’s Title and Dominion.

It will not be denied that at the time the United States acquired the Territory of Alaska by the Treaty of 1867, the waters of the Behring’s Sea washed only the shores of Russian territory. The territory on the Asiatic side she had possessed ‘ since the memory of man runneth not to the contrary. ’ Her title to the other portions of those shores and her dominion over the waters of the Behring’s Sea are based ‘ on discovery and settlement. ’

Possession and Supremacy.

The right of a nation to acquire new territory by discovery and possession has been so universally recognized by the law of nations that a citation of authorities is scarcely necessary. Upon this subject the most eminent as well as the most conservative of authorities says : ‘ All mankind have an equal right to things that have not yet fallen into the possession of any one, and those things belong to the person who first takes possession of them. When, therefore, a nation finds a country uninhabited and without an owner, it may lawfully take possession of it, and after it has sufficiently made known its will in this respect it cannot be deprived of it by another nation. ’

‘ Thus navigators going on voyages of discovery, furnished with a commission from their Sovereign, meeting islands or other lands in a desert state, have taken

possession of them in the name of their nation, and this title has been usually respected, provided it was soon followed by a real possession'. 'When a nation takes possession of a country to which no prior owner can lay claim, it is considered as acquiring the empire or sovereignty of it at the same time with the domain'. 'The whole space over which a nation extends its government becomes the seat of its jurisdiction and is called its territory'. (Vattel, p. 98).

Such being the law, we are led to inquire as to on what discoveries, possessions, and occupation Russia's right to dominion in North America is based.

Historical Sketch — 1725-1867.

In 1725, under the commission of that wondrous combination of iron and energy, Peter the Great, an expedition was organized, crossed the continent from St. Petersburg to Kamchatka, where a vessel was constructed, and in July 1728 sailed for explorations to the north and east. That vessel was the "Gabriel". Her master was Vitus Behring, a name destined to historical immortality. On the expedition Behring crossed the waters of the Sea of Kamchatka, discovered and named the Island St. Lawrence midway between which and the Asiatic mainland our boundary-line is laid down by the Treaty, and after passing through the straits which bear his name returned to St. Petersburg.

In 1733 a second expedition was organized under the auspices of the Government and the commission of Queen Anne, and with Behring, raised to the rank of Admiral, at its head, repeated the long and dreary journey across Siberia, and in June 1741 sailed for new discoveries. In July of that year Behring sighted the American continent, some authorities claim at the 58th degree of north latitude, others at the 50th degree. The latter is probably correct, as it rests on the authority of Stellar, who accompanied the expedition, and Behring undoubtedly sailed as far south along the American coast as the 45th parallel, in accordance with his instructions. But what is more pertinent to this inquiry, he discovered several of the Aleutian Islands and the Komanderoff group or couplet. On the larger of this couplet, which bears his name, the hardy navigator, after shipwreck, died on the 19th of December, 1741.

Russian Discovery.

But the spirit of Russian discovery survived him, and from the starting point he began traders, hunters, and adventurers made their way from island to island until the whole Aleutian Chain, and with it the mainland, was discovered. In 1743, 1745, 1747, and 1749 a Cossock sergeant named Bossof made four consecutive voyages from the mainland of Kamchatka to the Behring and Copper Islands in vessels of his own construction. In 1745 a sailor named Nevidchinof, who had served under Behring, crossed the channel which connects the North Pacific Ocean with the Behring Sea and discovered the islands of Attu, and Agatoo, the former of which now marks the western limit of our land dominion. In 1744 a small Russian merchant vessel reached the island of Atka and some of the smaller islands surrounding it.

Ten years later Glottoff, in a ship belonging to an Okotsk merchant, advanced as far as the island of Ounak, and subsequently discovered Ounalaska and the whole of that group of the Aleutian Chain known as the Fox Islands. He made a map of his explorations, which includes eight islands east of Ounalaska. In 1760 a Russian merchant, Adreian, Tolstykh, landed on the island of Adak, explored it and some of the surrounding islands, and made a report of his discoveries to the Russian Crown. This group was named after him, the Adreian Islands. The next year a ship belonging to a Russian merchant named Bechevin made the coast of the Alaska Peninsula, and in the autumn of 1762 Glottoff, who discovered Ounalaska and the Fox group, reached the island of Kodiak. In 1768 two captains of the Imperial Navy, Krenitzen and Leveshoff, sailed from Kamchatka in two Government vessels and the former passed the succeeding winter at Kodiak, and the latter at Ounalaska.

Twenty-five years succeeding the death of Behring the spirit of discovery had planted the Russian ensign along the entire Aleutian Chain from Behring's Island to the mainland of the North American Continent.

After the Seals.

Possession and occupation followed the foot-steps of discovery, and settlements and trading posts were established at the more favorable points along the line. Expedition stimulated by the large remunerations of the fur traffic, were constantly fitted out at the ports along the shores of the Sea of Okotsk and the mouth of the Amoor river for voyages of trade and exploration in the new country. Leut. Elliott, in his report on the seal islands, published with the 10th Census of the United States, estimates that no fewer than 25 companies with quite a fleet of small vessels were thus employed as early as 1772. Under the auspices of one of these companies, Shelekoff, a merchant of Rytsk, founded the first permanent settlement on the island of Kodiak in 1784. From this point exploring expeditions were sent out, one of which crossed the Strait between Kodiak and the mainland which bears Shelekoff's name, and explored the coast of the mainland as far as Cook's Inlet, upon the shores of which in 1786 a settlement was established.

Another pushed along the coast to Prince William Sound and Cape St. Elias, the latter of which was located by Behring in 1741. In 1788 another of Shelekoff's ships visited Prince William's Sound, discovered Yakutat Bay, and made a thorough exploration of Cook's Inlet. In the meantime, in 1786, Gehrman Pribilof, a Muscovite ship's mate, sailed from Ounalaska in a small sloop called the "St. George" discovered the islands which bear his name, located in the heart of the Behring Sea, and now far famed as the only seal rookeries in the known world.

Baranoff's Mission.

In 1790 the Shelekoff company placed at the head of all enterprises in the new country that restless spirit whose energy clinched Russia's dominion to her possessions in North America, Alexander Baranoff. Arriving at Kodiak, he changed the headquarters of the company to the harbor of St. Paul, where the village of that name now stands, and the next year one of his skippers passed round the extremity of the Alaska Peninsula and along the Northwestern coast to Bristol Bay, discovering Kvichak river and the Lake Llamna, and crossed the portage to the mouth of Cook's Inlet, thus finding the safest and quickest means of communication between Shelekoff's Straits and the Behring Sea.

In 1794 Baranoff established a ship yard at Resurrection Bay on Prince William Sound. About this time the first missionaries of the Greek church arrived, and Missions were established at Kodiak, Ounalaska and Spruce Island. The next year Baranoff extended his operations and trading posts to Yakutat Bay. Following this was the consolidation of all Russian interests in North America, giving rise to the Russian-American Company, which was chartered the year that Baranoff founded Sitka, 1799. The possessions and supremacy Russia gained under this Corporation have been so universally acknowledged and widely understood as to scarcely need comment. Under this Company, chartered by the Crown, patronized by nobility, sustained by the sinews of consolidated capital, and led by the tireless energy of Baranoff, new explorations and settlements inevitably followed.

As early as 1806, aside from trading posts and Settlements along the Aleutian Islands, we find the Russian-American Company had established fourteen fortified stations from Kodiak to the Alexander Archipelago, now known as Southeastern Alaska — one at Three Saints Harbour, one at St. Paul Island, one on the island of Kodiak, one off Afognak Island, one at the entrance of Cook's Inlet, three on the coast of the inlet, two on Prince William Sound, one at Cape St. Elias, two on Kantat Bay, and one at New Archangel, on the Bay of Sitka.

Along the Coast.

After the death of Baranoff, in 1819, his successor in charge of the affairs of the Company, Lieutenant Yanovsky, made extensive explorations of the coast and mainland above the Alaska Peninsula. One expedition explored and made a preliminary survey of the coast from Bristol Bay as far as the mouth of the Kuskovim River, discovering and locating that stream and also the Island of Nunivak, on parallel 60th degree, in Behring's Sea. Another passed beyond the mouth of the Yukon to Norton's Sound, and another entered the Nushegak River just above Bristol Bay, pushed into the interior, and crossed the mountains and tundras into the valley of the Kuskovim. Following these, in 1824 and 1826, were the explorations and surveys of Etholin and Luedke, further north on the coast of the mainland.

In 1824 that eminent divine of the Greek Church, Bishop Veniaminoff, visited the coast between Bristol Bay and the Kuskovim, establishing missions, chapels, and churches. Previous to this time, in 1815, Lieutenant Kotzebue, under the patronage of Count Rumiantzo, had discovered and surveyed Kotzebue Sound and the Arctic coast of America as far as Cape Lisburne. Lieutenant Tebenkof, of the navy, in 1835, established missions and redoubts at St. Michael's, on the Norton Sound, and in 1838, an expedition fitted out by him located Point Barrow. Meanwhile, expeditions had penetrated into the interior. Glazunof ascended the Yukon as far as Nulato, and made the first portage between that river and the Kuskovim in 1836, while Malakof reached the same point from the redoubt established by Veniaminoff on the Nushegak, by way of that river and the Kuskovim.

They were followed by Lieutenant Zagoskin, of the Imperial Navy, who in 1842-3 with five assistants made extensive explorations of basins of the Yukon and Kuskovim, a voluminous journal of which is now in print.

Unbroken Possession.

This brings us to the close of the first century of Russian discoveries and occupation in North America. It is needless to follow further, as the twenty-five years intervening between 1842 and the date of the Treaty of the United States are but a continuation and repetition of Russian occupation and supremacy of this territory. That possession was never changed or broken until it passed to the United States under the Treaty of 1867. The archives of Russia will further show that the Imperial Government itself not only fostered these discoveries, but from the earliest period has asserted and exercised dominion over the North American possessions.

The discoveries of Behring in 1728-1741 were under Royal Commission. In 1766 Tolstyk, after his discovery of the Adreian group of the Aleutian chain, was granted special privileges in the new possessions by an Edict of Catherine II. The expedition of Kreutzen, of the Imperial Navy, to Ounimak Island in 1758 was under commission of the same Sovereign. Upon the Report of the Committee of Commerce and the recommendation of the Governor-General of Siberia in 1768, Shelikof was granted a credit from the Public Treasury of 200 000 roubles to carry forward his enterprises in North America. By a Ukase of Catherine II in 1793 Missions of the Greek Church were established in the new dominion, and a Colony was also founded in Kodiak under Royal Edict.

The Russian American Company

The Charter of the Russian American Company issued in 1799 declares Russia's dominion in the following language : ' By the right of discovery in past times by Russian navigators of the Northwestern part of America, beginning from the 55th degree of North latitude and the chain of islands extending from Kamchatka to America and Southward to Japan, graciously permit the Company to have the use of all hunting grounds and establishments now existing on the Northwestern coasts of

America, from the above-mentioned 55th degree to Bering Strait, and on the same on the Aleutian Kurile Islands situated on the Northeastern Ocean.'

In conclusion, the Charter enjoins : ' All military and civil authorities in the above mentioned localities not only not to prevent the company from enjoying to the fullest extent the privileges granted but in case of need to protect them with all their power from loss or injury, and render them, upon application of the company, all aid, assistance and protection. '

This assertion of dominion by Russia was reiterated in 1820, when, by an Imperial Ukase, Alexander I granted the second charter to the Russian American Company, renewing its privileges for twenty years, and was again asserted in 1844 by the granting of the third charter, which not only increased the privileges of the company, but also provided a system of colonial government for the Russian American colonies for the twenty succeeding years.

Russian Ordinance of 1821.

All these assertions of jurisdiction and dominion passed unchallenged, but in 1821 the Imperial Government had issued an ordinance regulating traffic in its Asiatic and American possessions, and reserved exclusively to subjects of the Russian empire ' the transaction of commerce, the pursuit of whaling and fishing, or any other industry, on the islands, in the harbors and inlets, and in general along the Northwestern coast of America, from Behring Strait to the 51st Parallel of North Latitude, and in the Aleutian Islands, and along the coast of Siberia and on the Kurile Islands from Behring Strait to the Southeastern promontory of the Island of Ur — upviz, as far south as latitude 43 degrees and 50 degrees North'.

This Ordinance called forth the protests of the United States and Great Britain, and protracted discussions followed. A critical examination of the diplomatic correspondence between the United States and Great Britain on one side and Russia upon the other will disclose that the points in dispute in the controversy were the assertion of Russia to exclusive jurisdiction over the Pacific Ocean, the assertion of dominion over the coast of North America from the 55th parallel south to the 51st. (See note of Mr Adams, American Minister to Russia, to the Russian Minister March 1822).

Following these discussions came the Treaty of 1824, between Russia and the United States, and the analogous Treaty of 1825 between Russia and Great Britain. By these Treaties Russia receded from her assertion of exclusive jurisdiction over the Pacific Ocean, and abandoned her claim to possessions on the coast of North America, south of 54° 40'.

The Treaty.

The following are the Articles of the Treaty between the United States and Russia germane to the questions involved in the case :

ARTICLE I.

' It is agreed that in any part of the Great Ocean, commonly called the Pacific Ocean or South Sea, the respective citizens or subjects of the High Contracting Powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts upon points which may not already have been occupied for the purpose of trading with the natives saving always the restrictions and conditions determined by the following Articles. '

ARTICLE II.

With a view of preventing the rights of navigation and of fishing exercised upon the Great Ocean by the citizens and subjects of the High Contracting Powers from becoming the pretext of an illicit trade, it is agreed that the citizens of the United States shall not resort to any point where there is a Russian establishment without the permission of the Governor or Commander, and that reciprocally the subjects

of Russia shall not resort without permission to any establishment of the United States upon the north-west coast.

ARTICLE III.

It is, moreover, agreed that hereafter there shall not be formed by the citizens of the United States, or under authority of the said States, any establishment upon the north-west coast of America, nor in any of the islands adjacent to the north of 54° 40' north latitude, and that in the same manner there shall be none formed by the Russia subjects, or under the authority of Russia, south of the same parallel.

ARTICLE IV.

It is, nevertheless, understood that during a term of ten years, counting from the signature of the present Convention, the ships of both Powers, or which belong to their citizens or subjects respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbors, and creeks upon the coast mentioned in the precedings article, for the purpose of fishing and trading with the natives of the country. (Wheaton's International Law, vol. I, pp. 2-112).

The Treaty between Russia and Great Britain contains substantially the same provisions. Neither in the Treaties nor in the correspondence, is any reference made to Russia's claim of dominion over the Behring Sea. If in the diplomatic correspondence leading up to the Treaty any challenge as to the jurisdiction of Behring Sea had been made, why was it not settled by the Treaties? Did the High Contracting Powers to these Treaties enter into a discussion lasting nearly two years as to one matter and make adjustment by Treaty as to other matters?

The Convention between Russia and Great Britain aside from disposing of the question of Russia's asserted sovereignty over the Pacific Ocean and fixing the Southern limit of her possession on the western coast of North America, also established the dividing line of their respective North American possessions from 54.40 north to the frozen ocean, which boundary-line is incorporated *verbatim* into the Treaty of Cession of 1867 from Russia to the United States. (Treaty of 1867, Article I.)

If differences existed as to the dominion of the Behring's Sea, why were they not also settled, as that manifestly would be a part of the object of holding the Convention?

Russia's jurisdiction.

It cannot be successfully maintained that by such terms as the "Great Ocean" the "Pacific Ocean" or the "South Sea", the High Contracting Powers referred to the Behring's Sea. Aside from this, it is stipulated in both Treaties that the ships, citizens, and subjects of either Powers may reciprocally frequent the interior seas, gulfs, harbours, and creeks of the other on the North American coast for a period of ten years. The only interior den on the North American Coast was the Behring's Sea held by Russia. If that was a part of the "Pacific Ocean", or the "Great Ocean", or the "South Sea", or belonged to the high seas under the law of nations, why the term "interior sea" and why should the United States and Great Britain accept a ten years' limit of the right of navigation, fishing, and trading in an interior sea if they had the unconditional right to frequent those waters under the law of nations?

This section of the Treaty, therefore, really concedes Russia's dominion over Behring's Sea. Chancellor Kent alludes to this subject as the "claim of Russia to sovereignty over the Pacific Ocean north of the 51st degree of latitude". (Kent Vol. 1, p. 28).

A summary of results following the discussions and Conventions as to the Royal Ordinance of 1821 is the abandonment by Russia of her claim to sovereignty over the Pacific Ocean; a surrender of her claim to the North American coast south of 54 degrees 40'; a settlement by Russia and Great Britain as to the boundary-line of their possessions in North America; agreements as to settlements upon each

other's territory and navigation of each other's waters, but no surrender of Russia's jurisdiction over the Behring's Sea.

Powers of Congress.

Upon this branch of the subject, the power of Congress, over Behring's Sea, there seems to be little room for discussion. The power of a nation to control its own dominions is one of the inherent elements of sovereignty.

“ When a nation takes possession of certain parts of the sea, it takes possession of the empire over them as well as of the domain on the same principles which are advanced in treating of the land. These parts of the sea are within the jurisdiction of the nation and a part of its territory; the Sovereign commands them; he makes laws and may punish those who violate them; in a word, he has the same rights there as on the land, and in general every right which the laws of the State allow him ”. (Vattel's “ Law of Nations ”, p. 130).

By the Treaty of 1867, ‘ the cession of territory and dominion therein made is declared to be free and unencumbered by any reservations, privileges, franchises, grants or possessions..... and conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion and the appurtenances thereto ’. (Treaty Article 6).

The Constitution of the United States declares that all Treaties made under the authority of the United States shall be the supreme law of the land. (Constitution of the United States, Article 6).

That same instrument vests in Congress ‘ the power to make all needful rules and regulations respecting the territory or other property belonging to the United States ’. (Constitution of the United States, Article 4 section 3).

Manifestly, the Acts of Congress contained in chapter 3, Revised Statutes for the United States, “ relating to the unorganized Territory of Alaska ”, and under which the information is brought, are embraced within these constitutional provisions.

Conclusion.

The foregoing record may contain but a meagre idea of the indomitable energy and perseverance displayed by the Russian people in acquiring empire in North America, beginning with discoveries of Behring in 1728, and extending for more than a century and a quarter, wherein they braved the perils of land and sea, overcame a savage native population, faced ice and snow, storm and shipwreck, to found and maintain empire on these rugged shores. Enough has been said to disclose the basis of Russia's right to jurisdiction of the Behring's Sea under the law of nations, viz., original possession of the Asiatic coast followed by discovery and possession of the Aleutian chain and the shores of Alaska north, not only to Behring's Strait but to Point Barrow and the frozen ocean, thus inclosing within its territory, as within the embrace of a mighty giant, the islands and waters of Behring's Sea, and with this the assertion and exercise of dominion over land and sea.

Such is our understanding of the law, such is the record. Upon them the United States are prepared to abide the Judgments of the Courts and the opinion of the civilized world.

Senator Morgan. — Is there any dispute about that long and historical résumé found in that statement?

Sir Charles Russell. — I do not think anything which would need criticism of it in any detail. I do not think it is historically correct in some particulars, but I do not think they are of sufficient importance to require notice.

Senator Morgan. — Generally it is historically correct.

Sir Charles Russell. — I should say so.

Mr Phelps. — Perhaps it is only fair to my learned friends to state that, upon any investigation we have been able to make, we have no reason to suppose that that case was prepared by anybody connected with the Government of the United States in Washington, or used in that case.

It is telegraphed from Ottawa, and that is the first and all that we know about it.

Sir Charles Russell. — Then I must say this is the most extraordinary case of a forgery that the world has ever known.

Mr Phelps. — I do not mean to say that it was a forgery. It was not used in the case, so far as we have learned.

The Tribunal here adjourned for lunch.

The President. — Sir Charles, if you will continue your argument, we are ready to hear you.

Sir Charles Russell. — Mr President, I am not surprised, nor do I in the least complain, of the interposition of my friends at the point at which the discussion broke off. It is a very important point indeed to ascertain whether this is a genuine brief, and important also, although not so vitally important, to ascertain whether it was prepared at Washington. But whether it was prepared at Washington or whether it was prepared elsewhere, it was prepared by the Counsel who were put forward to represent the views and the contentions of the United States, and to formulate the grounds of fact and of law upon which those views were based, and by which they were to be defended.

Senator Morgan. — Are the names of those counsel given, Sir Charles?

Sir Charles Russell. — Yes : Mr A. K. Delaney ; and I will only say that it is obvious upon the face of the document itself that it was prepared not only by a man of considerable ability, but by a man who had devoted considerable research and thought to the subject, and one, more over, who had access to official documents and records in the preparation of this “ brief ” to be laid before the Court ; and certainly it is a very high testimony to the ability of the counsel in this rather out of the way place, if, without instructions from Washington, and without having the materials for this argument put at his disposition from Washington, he was able to frame so exceedingly good a one. But I hardly think he could, without authority from “ head-quarters ”, if I must use that expression, have ventured to speak in the way he has done of these contentions unless he was so authorised, for he concludes with these words :

Such is our understanding of the law, such is the record. Upon them the United States are prepared to abide the judgments of the Courts and the opinion of the civilized world.

Now I wish to put this Tribunal in full possession of how this brief has been introduced into our Case : how it has been drawn to the attention of the United States Counsel, and how they have dealt, or rather failed to

deal, with it. In the first instance it is introduced into the original Case of Great Britain. You will find it, Mr President, at page 127.

The Counsel appearing for the United States Government, to justify the seizure of the “ Anna Beck ” and other vessels in 1889, filed a brief, from which the following extracts are taken.

Now in the margin you will see that we refer to the documents from which that is originally taken, namely the Blue Book — that is to say, the parliamentary Blue Book of Great Britain — and also to Appendix, vol. III — the large volume from which I have been reading it this morning.

But I am now in a position to inform you that that we have actually in this building, at this moment, the gentleman who forwarded that very document to the “ New York Herald ”. The “ New York Herald ”, as I have said, and as you know, is a paper of some importance. It appears to be published in the “ New York Herald ”, with the statement that it is understood to have been prepared in Washington — a statement never denied; and the gentleman is prepared to state — he will be put on any affirmation that the Court think desirable — that he received that as the brief prepared at Washington from the gentleman who represented the Government of the Queen watching the proceedings, who, in his turn, stated that he had received it from the Counsel engaged in the case; and therefore I think the chain of evidence is rather complete upon the point.

Senator Morgan. — You mentioned a fact, Sir Charles, that I was not aware of before. You speak of the Counsel representing the Government of the Queen in these cases.

Sir Charles Russell. — He was watching the proceedings.

Senator Morgan. — In these cases?

Sir Charles Russell. — So I have been informed.

Senator Morgan. — In Alaska?

Sir Charles Russell. — So I have been informed. But the matter does not stop there. I proceed to the next stage. I find this very document referred to in another place. I must trouble the Tribunal to refer for a moment to page 279 of vol. III of the Appendix to the British Case, and you will see the document headed Appendix, No 2 :

Extract from the Report of the Governor of Alaska for the Fiscal Year 1887. Protection of fur-seals :

In connection with these seizures, from which it seems to me no other inference can be drawn than that our Government is determined to assert and maintain the right of exclusive jurisdiction over all that portion of Behring's Sea ceded to it by Russia, I can only reiterate that part of my last Annual Report, in which I essayed, rather feebly I fear, not only to show the necessity of such a policy to the preservation of the sea-fur industry, but the wrong its abandonment would inflict upon the very considerable number of native people who wholly or in large part depend upon it for a livelihood, and whom, it appears to me, it is the duty of the Government to protect.

In view of the fact that the seizure of these vessels and their forfeiture has raised an international question of grave importance; I have thought it proper to include with this Report a copy of the brief submitted by the Queen's Counsel in

the case of the British schooners, together with the argument of the United States attorney and the opinion of the Court.

Honourable A. K. Delaney, Collector of Customs having been designated as special Counsel on account of the illness and subsequent death of colonel M. D. Ball, United States' District Attorney, represented the Government and made what I think will be generally conceded a most able and forcible, if not wholly unanswerable argument.

So that this gentleman making his Official Report as Governor of Alaska forwards also a copy of this document, and any difficulty or difference that arises between my friend and myself upon the complete authenticity and reliability of the "brief" we have cited, would of course at once be removed by the production of the document which the Governor of Alaska enclosed. If my friend can produce it, I think it will be found that the two documents are, *verbatim et literatim*, in agreement.

Senator Morgan. — Sir Charles, I am not sufficiently familiar with the proceedings of the British or Canadian Tribunals, to ascertain without enquiry from you, what is meant there by the brief of "the Queen's Counsel".

Sir Charles Russell. — It clearly means that he was the Counsel representing the case of the British owners of schooners.

Senator Morgan. — That means Counsel appearing for the Government.

Sir Charles Russell. — No; it means a Counsel who is a "Queen's Counsel", just as my friend is a "Queen's Counsel", and as I am.

Senator Morgan. — It is the description of his position in the profession?

Sir Charles Russell. — It is the description of the position in the profession of the Counsel in the case of the British schooners.

Now I am going to refer to that brief. The brief in answer to the case on the part of the United States is to be found in the same book — that large volume — page 100; and as I understand the procedure in the Court upon this point — I am speaking without certain knowledge upon it, and I should therefore be glad to be corrected, but I gather from what appears, and from other information, that the course is that stated by my learned friend Sir Richard Webster, namely, that the proceedings originate in a libel or summons, and that, after that, the counsel for the Libellant files his Brief, or what we should call in Great Britain "Statement of Claim"; that being filed, the other side files, in his turn, his "Brief", which is the answer which the Defendant puts forward to the Statement of Claim; and, accordingly, the Brief on behalf of the owners of the schooners, and filed in the Court, is set out at page 100 of that large volume. I am not going to trouble the Court to read it, but I wish to show that the person who prepared this Brief had before him the Brief on the part of the Libellant, because he follows the various grounds, which he takes one by one — very much shorter — (as an answer generally speaking is shorter than the original allegation which is traversed) — very much shorter, but taking up all the points.

Senator Morgan. — I think what you call a “ Brief ”, we call a “ Libel ” or “ Information ”.

Sir Charles Russell. — It is variously phrased, “ Case ”, “ Factum ”, “ Statement of claim ”, “ Declaration ”. There are varying phrases for it.

Senator Morgan. — The proceedings on the part of the Claimant we should term here an “ Intervention ”, if there is an Intervention.

Sir Charles Russell. — In this Brief (which I do not propose to trouble the Court by reading) he proceeds to state, in the first paragraph, under what section the vessels in question are seized, these vessels being the “ Anna Beck ”, the “ Dolphin ”, the “ Grace ” and the “ W. P. Sayward ”. Referring then to the statutes (with which I do not trouble the Tribunal), he then refers, in the next paragraph, to the “ Rights of Great Britain and the United States ”, respectively. He next passes to the consideration of “ A Treaty with Russia ”; next to “ Russia’s Claims ”; next to the “ Authorities quoted ”, dealing actually with the authorities cited; then he deals with “ Mr Secretary Seward’s views ”, which you will recollect my friend read at some length; and, finally on page 102, he sums up the matter, and gives his short answer to it very clearly, and, as I think, also very concisely. He says :

It also appears that the United States, in claiming sovereignty over the Behring Sea, is claiming something beyond the well recognized law of nations, and bases her claim upon the pretensions of Russia which was successfully repudiated by both Great Britain and the United States.

A Treaty is valid and binding between the parties to it, but it cannot affect others who are not parties to it. It is an agreement between nations, and would be construed by law as an agreement between individuals. Great Britain was no party to it, and therefore was not bound by its terms.

It is therefore contended that the proceedings taken against the present defendants are *ultra vires* and without jurisdiction. But in order to press the matter further, it may be necessary to discuss the act itself under which the alleged jurisdiction is assumed.

Thereupon he proceeds to point out, very much on the lines I have been submitting to the Court, that there is nothing in the words of the statutes which necessarily include foreigners, and that according to proper principles of construction they ought not to be construed as applying to foreigners outside the territorial limits. He then concludes in these words :

So here it is submitted that a decree of your Honour’s Court will not give any validity to the seizures here made, and the defendants, in filing their demurrer and submitting this argument, do not thereby waive their rights, or submit to the jurisdiction of the Court.

Now finally I have to say that, as it has been so cited in the original Case, and set out at length in the documents which form part of the Appendix to the Case, it comes upon me a little by surprise, it is a little remarkable, that at this late stage of the controversy this contradiction should be suggested. I quite understand why my friends feel pinched by it, because the position is one absolutely impossible, if not ridiculous, for a great Power which has formulated its grounds of jus-

tification, and said : Upon these ground I abide by the judgment of the Court, and by the judgment of that greater Court, the opinion of the civilized world : for it then to say : These not are the true grounds at all ; the real grounds were something entirely different from these.

Although up to this moment the Tribunal will not have seen any trace of the affirmation of this simple ground, if it were present in the minds of any of the ingenious and well learned advisers of the United States, that all this reference to Statute law was wholly beside the question : We were but exercising our inherent rights of protection of property and property interests given to us by the consent of the civilized world — in other words, given to us by the law of nations.

Well, but let us see what was the ground upon which the judgments proceeded.

Senator Morgan. — If both grounds had been stated in the libellant's case there would have been no repugnance between them.

Sir Charles Russell. — Repugnance as to what?

Senator Morgan. — To it being stated in the libel or information that the United States claimed a right under the laws of nations; and also, that it was possessed of a property right.

Sir Charles Russell. — You mean to say if they had said we are complaining of a breach of the municipal Statute, and also complaining of a breach of law of property?

Senator Morgan. — Yes.

Sir Charles Russell. — Certainly there would have been a repugnance : I shall presently have to deal with that.

Lord Hannen. — I suppose you are pointing to this : If it had been simply a seizure by virtue of this right of property, or protection of property, there would have been no right to fine.

Sir Charles Russell. — Much more than that, my Lord : but to that, amongst other reasons. There would have been no right to fine; and the court that would have had the right to adjudicate upon a claim of that kind would not be sitting as a Municipal Court — a Court belonging to Alaska in the United States, — but would be sitting as a Prize Court representing the whole world. That is the real vital distinction; and the distinction that my learned friend Mr Carter in his ingenious attempt to base the judgment, or justify the judgment, of this “Two penny-half penny” judge — as my friend in a moment of forgetfulness called him — is wholly futile. He has entirely forgotten that a Municipal Court, as such, does not administer International Law at all; it has to administer the law of the State, and the law of the State only.

Senator Morgan. — That was a United States Court?

Sir Charles Russell. — Yes. I intended, in a moment or two, to develop this idea, but as it is mentioned, let me just say a word upon it in passing. I am not concerned to dispute that the Sovereign Power at whose instance a capture is made upon the high seas may not constitute a Municipal Court, *pro hac vice*, a Prize Court; but according to its original

constitution and functions it is a Municipal Court having no cognizance of any law except Municipal law, and International law so far as it enters into Municipal law, but no further. To enable it to adjudicate as a Prize Court, it must be brought to the apprehension of the Judge that he is no longer in a United States Court administering the municipal law — that he must shut his eyes to Municipal law, and that he is administering International law in the interests of all nations. The distinction is broad, clear, unmistakable and intelligible. But I am proceeding still on the theory that he did not affect to act, that he was not asked to act, in any other character than as a municipal Judge construing a municipal statute, and for that purpose of course it is necessary to examine the judgment itself. The judgment is to be found on page 113.

The President. — This is on your point of fact that you are arguing all this?

Sir Charles Russell. — Yes.

The President. — I understood that from the principles you laid down when you began this part of your argument?

Sir Charles Russell. — Quite so. The judgment of Mr Justice Dawson is to be found at page 113 of Volume I of the Appendix Judgment of Judge Dawson. to the American Case. I will not read this judgment because it goes over the same ground as the later judgment which I desire to have read more fully. It relates to the seizures effected in 1886. He is addressing the jury, and telling them that the information is preferred and filed by the District Attorney, based upon an affidavit charging the Defendants with having killed a certain number of seals and other fur-bearing animals in the waters of Alaska, contrary to the provisions of section 1956 of the Revised Statutes. He then proceeds to say that it is the duty of the Court to instruct the jury as to the law applicable to the facts, and that it is their duty to find the facts. Then he proceeds to say :

For the purpose of aiding you in your deliberations, I will define to you the western boundary line of Alaska as designated and set forth in the treaty of March 30, 1867.

He refers to that Treaty, and then he proceeds.

All the waters within the boundary set forth in this Treaty to the western end of the Aleutian Archipelago and chain of islands are to be considered as comprised within the waters of Alaska, and all the penalties prescribed by law against the killing of fur bearing animals must therefore attach against any violation of law within the limits before described.

If, therefore, the jury believe from the evidence that the defendants by themselves, or in conjunction with others, did, on or about the time charged in the information kill any otter, mink, marten, sable or fur-seal, or other fur bearing animal or animals on the shores of Alaska, or in Behring Sea, east of the one hundred and ninety third degree of west longitude, the jury should find defendants guilty.

Then I skip one passage, and proceed.

The jury are further instructed, as a matter of international law, that it makes no difference that one or both of the accused parties may be subjects of Great Britain. Russia had claimed and exercised jurisdiction over all that portion of Behr-

ing Sea embraced within the boundary lines set forth in the Treaty, and that claim had been tacitly recognized and acquiesced in by the other maritime powers of the world for a long series of years prior to the Treaty of March 30 th, 1867.

Then he proceeds to set out, a little more fully, the terms of that Treaty, and then goes on to say that thereby America acquired absolute control and dominion over all the rivers, and so forth; and finally,

And British vessels manned by British subjects had no right to navigate the waters before described for the purpose of killing any of the furbearing animals heretofore designated.

Then the Jury are further instructed that on the 3rd of August the Act of Congress of 1870 was passed, that the lease was made, and so forth; and then the question of fact which is left to the jury is one with which he might have hardly troubled them, whether or not they were engaged in sealing to the east of what has been, for brevity, called the line of demarcation. So much for the judgment of 1886. The judgment of 1887 is on page 115, and the material parts of it, at least, must be read, and I will, therefore, with your permission, ask my learned friend to, read it.

Sir Richard Webster. I will read it shortly. It is in the case of four ships, the “ Dolphin ”, the “ Anna Beck ”, the “ Grace ”, and the “ Ada ».

The libel of information in the case of the schooner « Dolphin » is similar to the informations filed against the other schooners named, and alleges that on the 12th day of July, 1887, the commanding officer of the United States revenue cutter “ Rush ” seized the schooner “ Dolphin ” in that portion of Behring Sea which was ceded to the United States by Russia in the Treaty of March, 1867. That said schooner was violating section 1956 of the Revised Statutes in relation to the protection of sea life in the waters of Alaska. To the libel of information the Queen’s counsel of British Columbia filed a demurrer, alleging that the district court of Alaska had no jurisdiction over the subject matter of the action, for the reason that the schooner was more than one marine league from the shore when seized, and that the Act of Congress of July 27th, 1868, is unconstitutional, in that it restricts free navigation of the Behring Sea for sealing purposes. A stipulation, signed by the Queen’s counsel Mr M. W. T. Drake, upon the part of the British owners, and Mr A. K. Delaney upon the part of the United States, was filed, in which it was agreed and conceded that the masters of the vessels named were taking furs in that portion of Behring Sea which is claimed by the United States under the Treaty with Russia of March, 1867.

The issue as presented involves an examination of a most pertinent and critical question of international law. It will be necessary to ascertain, first, the right of the Imperial Government of Russia to the Behring Sea anterior to the Treaty of March, 1867, and for information upon this subject I am largely indebted to Mr. N. L. Jeffries for a collection and citation of authorities and historical events, and for the want of books at my command upon this question, I am compelled to rely for historical facts upon his carefully prepared brief. From this elaborate brief I glean the following facts.

Then he describes the Sea of Kamschatka. He describes how Peter the Great in the early part of the Eighteenth Century directed the exploring expedition; the Court will be able to follow the dates. He talks of the expedition of 1725, and the expedition of 1728; and the discovery of the Island of Saint Lawrence; and the expedition of 1741.

Sir Charles Russell. — Those are the events mentioned in the brief, which we have not read in full, and which are referred to in the order that the Judgment refers to them.

Sir Richard Webster. — The vessels were the “ St. Paul ” and the “ St. Peter ”; and, on the 18th of July 1741, Behring first saw the Continent of America. And he describes Behring’s visit.

The enterprising spirit of Russian merchants and traders even in Siberia was awakened by the accounts given of the industries that might be created.

The President. — That brief was the practical foundation of both judgments of 1886 and 1887, was it not ?

Sir Richard Webster. — Yes. At page 117 he refers to the Ukase of the 27th, December, 1799, and then reads from Mr Chief Justice Marshall’s judgment in *Johnson v. Mc Intosh* :

On the discovery of this immense continent the great nations of Europe were eager to appropriate to themselves so much of it as they could acquire.

Then he refers to Chancellor Kent.

All that can be reasonably asserted is that the dominion of the sovereign of the shore over the contiguous sea extends as far as is requisite for his safety, and for some lawful end.

And then he refers to Vattel, and then, at the top of page 118, he proceeds.

The Queen’s counsel lays much stress in his argument upon the fact that both the United States and Great Britain treated with Russia (the United States in 1824, and Great Britain in 1825) in relation to the free use of the waters in Behring Sea, and it is claimed that by these Treaties the sea was thrown open as the common property of mankind. But an examination of these Treaties and the objects in view by the three great Powers fails to warrant the conclusion reached in the argument. The principal parts of the Treaty between the United States and Russia, the treaty between Great Britain and Russia being similar, are thus set forth by Professor Wharton;

And he reads Articles 1, 2, 3, 4, and 5 of the Treaty of 1824. And at the bottom of the page he continues :

Nations, like individuals, have the right of contracts, and their treaties are subject to the same rules of interpretation and of morality which govern in municipal law.

“ Estopped ” in law is a term, the etymology of which implies the preclusion of a person from asserting a fact by previous conduct, inconsistent therewith, on his own part or on the part of those under whom he claims. It is in law a prohibition which denies a man the right of alleging or denying a fact in which he has with a full knowledge long acquiesced. Applying this rule the conclusion can not be escaped that in consequence of the acquiescence of Great Britain in the claim, jurisdiction, and dominion of Russia to what is now known as Behring Sea since the expiration of the Treaty of Russia and Great Britain in 1825, which was to exist ten years, Great Britain and her Dominion Government, of which British Columbia is a part, are estopped from any claim of right or privilege of taking fur bearing animals in Behring Sea, east of the line mentioned as our western boundary in the Treaty.

Then he mentions the western boundary, which is the line on the map, and then proceeds at the bottom ;

The courts have the same right and power, when called upon to interpret a public Treaty, to derive aid from contemporaneous interpretation, and by ascertaining the intention of those whose duty it is, under the Constitution, to make Treaties, as they have in the interpretation of any other law. What then was the object in purchasing Alaska? Manifestly to extend our Northwest boundary line so as to include the whole group of the Aleutian Islands.

Then he refers to Senator Sumner's speech, and then :

Subdivision 2 of section 2 of the Constitution in defining the powers of the President says.

He shall have power, by and with the advice and consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.

Then :

Judge Story, in considering this clause of the Constitution, says : It will be observed from this that the power to make treaties is by the Constitution general, and, of course, it embraces all sorts of treaties for peace or war, for commerce or territory.

Then :

It is argued that this question belongs to the political department of the Government, and that it should be there adjusted, but this position is, I think, wholly untenable, at least at this stage of the controversy.

Then the learned Judge cites Story on the question of making Treaties ; and then I had better read at the bottom of page 120.

Congress recognized the right of the United States to the whole of the new acquisition by appropriating \$ 7,200,000 to pay for the new territory, and on the 27 th day of July, 1868, extended the laws of the United States relating to customs, commerce, and navigation over all the mainland, islands and waters of the territory ceded to the United States by the Emperor of Russia. [See Revised Statutes, sec. 1954].

Showing unmistakably the understanding of the Government at the time as to what had been acquired, and that our boundary line was located at the one hundred and ninety third degree of west longitude. The longitude of a place is the arc of the equator intercepted between the Meridian passing through that place and some assumed meridian to which all others are referred. Different nations have adopted different meridians. The English reckon from the Royal Observatory at Greenwich ; the French from the Imperial Observatory at Paris, and the Germans from the Observatory at Berlin, or from the island of Ferro. In the United States we sometimes reckon longitude from Washington, and sometimes from Greenwich. But in establishing the western boundary line of Alaska the reckoning of longitude was from Greenwich, which reaches the line dividing the Continents of Asia and North America.

The purchase of Alaska was unquestionably made with a view to the revenues to be derived from the taking of fur-seal in the waters of Behring Sea, and especially on the Islands of St. Paul and St. George, both of which were, by Act of Congress of March 3rd, 1869, made " a special reservation for Government purposes ".

Secretary Seward was a skilled diplomat, a learned man in statecraft, and he evidently foresaw the income to be derived by the Government from the seal industry on and adjacent to those islands. Hence, in the negotiation he insisted upon, and Russia conceded, that our boundary line should be extended to the

meridian named in the Treaty. The industry and consequent revenues would be hopeless without the residuary power of the United States to protect and regulate the taking of fur-bearing animals in that part of our domain. The effort of the United States to seize and drive out the illicit piratical craft that have been navigating those waters for years, indiscriminately slaughtering fur-bearing animals, the continuation of which can but result in the wanton destruction of the rookeries, the most valuable in the world, is a legitimate exercise of the powers of sovereignty under the law of nations, with which no nation can lawfully interfere.

The question of the constitutionality of the Act of Congress of July 27th 1868 (Revised Statutes, page 343), scarcely deserves notice, since it has been sustained by this court.

The conclusion I have reached is that the demurrer must be overruled, and it is so ordered; and that judgment of forfeiture to the United States be entered against each of the vessels separately, together with their tackle, apparel, furniture, and cargos, saving to the masters and mates their private property, such as nautical instruments and the like.

Sir Charles Russell. — I think there can be little doubt, at least I submit there can be little doubt, that I am now warranted in assuming that the Tribunal, having followed this argument, cannot fail to have arrived at this clear conclusion: that these vessels were seized for a supposed breach of a municipal Statute, that the men were imprisoned by the judgment of the Court, and that the confiscation of the vessels seized was part of the penalty attached by the municipal law for this breach.

Now, I have a word to say, before I ask the Court's permission to sum up the general conclusions, about the character of the Court itself. It is a municipal Court administering the municipal law, part of which municipal law undoubtedly is, as far as it enters into municipal questions, international law. But a Prize Court is a distinct Court, with distinct functions; not acting upon municipal law but shutting its eyes to municipal law altogether as such; deriving its authority, no doubt, from the appointment of the Sovereign Power that has caused the marine capture to be effected, but although deriving its authority from that creation, from the moment that it has created it it ceases to be a municipal Court. I should have thought these things were almost elementary in the subject, but as my learned friend, Mr Carter, did not appear even to think it necessary to consider what must be the character of an international Court if its decree is to be regarded as a Judgment of an international Court, I must call the attention of the Court briefly to some authority upon the subject.

The distinction between Prize Courts and Municipal Courts.

I cite the work well-known in England and, I think, not unknown in America, Manning's "Commentaries on the Law of Nations"; and the edition from which I cite is the one published in 1875 by Mr Sheldon Amos, himself a writer of distinction, a member of the Bar and Professor of Jurisprudence at University College, and Lecturer on International Law to the Council of Legal Education of the Inns of Court in London; and on page 472 he says:

"Questions of maritime capture are adjudged by Courts specially constituted for that purpose. The form of these Courts is different in different countries, but in all they are distinct from the municipal tribunals of the country and are commis-

sioned to decide according to the law of nations, including the engagements of treaties where any such exist.

I need not stop to point out that, as between two countries who have entered into a treaty which gives to the two Powers, parties to the treaty, rights, among others it may be rights of capture, those treaties constitute as between those Powers, and as binding upon them, a portion of international law. Ordinarily speaking, Prize Courts have to deal with a state of belligerency; as, for instance, where, in the struggle for mastery, one Power seeks to obtain possession of the property and the resources of another, or where one Power seeks to get hold of contraband of war which, if obtained by its opponent, would be of importance to that opponent in the fight: or, again, questions of seizure for running a blockade — questions, which would arise when the ship was brought into the Prize Court, whether the blockade was effective, questions whether the blockade had been properly notified, and other questions of that description. Ordinarily, therefore, Prize Courts have to do with a state of belligerency, not exclusively, but the main exception — I will not undertake to say the sole exception, though I know no other — is cases of capture, where quasi-belligerent rights are exercised or exercisable under treaty as between particular Powers; thus, for instance, assuming there is a Slave Trade Treaty between the United States of America and Great Britain by which rights of search are conceded to the respective Powers, and the right of seizure of vessels engaged in carrying on that trade, a seizure effected by one or other of the Powers brought into a Prize court, the question in that case would not be whether, according to the general international law, the seizure was justifiable and confiscation ought to follow, but whether by international law, plus the provisions of this treaty, the particular property had or had not been justifiably captured.

Mr Justice Harlan. — It may assist you in your argument, Sir Charles, for me to suggest that this Court in Alaska has jurisdiction which is defined by an Act of Congress, as it exercises only such jurisdiction as the Act creating it authorizes.

Sir Charles Russell. — That is my point. I am obliged to you, Mr Justice Harlan, for mentioning it.

Lord Hannen. — Have you got the Act?

Sir Charles Russell. — I have not, but my learned friends can place it at our disposition.

Mr Phelps. — They have prize jurisdiction under the general judiciary Act.

Sir Charles Russell. — I should like to see it.

Mr Phelps. — We will bring it in.

Sir Charles Russell. — I began, early in my observations, by saying I did not stop to consider the question whether or not a municipal Court might or might not be constituted a Prize Court. My point here is that it was *not invoked* as a Prize Court; that no proceedings of any kind which

bear the faintest resemblance to proceedings in a prize suit were instituted. It cannot be at one and the same time performing the functions of a municipal Court and of an international Court. The two positions are repugnant and inconsistent the one with the other. In the one, the judge is administering the municipal law, and in the other he shuts his eyes to the municipal law and administers international law and international law alone.

Senator Morgan. — You say that you could not embrace both ground of forfeiture in the same Information.

Sir Charles Russell. — Unquestionably that is my contention. That is made clear if the Tribunal will bear with me a little longer, in the same book, at page 479, where the point is further discussed.

For the history and true limits of the jurisdiction of the English High Court of Admiralty in prize cases, see Lord Mansfield's judgment in *Lindo v. Rodney and another*, cited in a note to *Le Caux v. Eden*, Douglas' Reports, volume II, page 594. His lordship distinguishes the functions of the judge of the court under his general commission and those under a special commission issued only in time of war. This distinction gives rise to the two aspects of the Court of Admiralty, that of an "instance" court and that of a "prize" court.

You will recollect I called attention yesterday to the language in relation to this particular Court which pointed to it being regarded as an "Instance" Court and a Court of original jurisdiction.

"The manner of proceeding", says Lord Mansfield, "is totally different. The whole system of litigation and jurisdiction in the prize court is peculiar to itself; it is no more like the Court of Admiralty than it is to any court in Westminster Hall" By the Naval Prize Act of 1864, which recited that it was expedient to "enact permanently, with amendments, such provisions concerning naval prize and matters connected therewith as have heretofore been usually passed at the beginning of a war" the High Court of Admiralty has jurisdiction given it throughout Her Majesty's dominions as a prize court, and an appeal is given to the Judicial Committee of the Privy Council.

I point out that that is very much like the case my learned friend suggests; that this is a Court which has power to act as a Prize Court under the Act of Congress, because under the Naval Prize Act of 1864 there is given to the Court of Admiralty powers to act as a Prize Court. Now he proceeds.

The true functions of a prize court are curtly expressed by Lord Mansfield in the course of the judgment above referred to. "The end of a prize Court is, to suspend the property till condemnation; to punish every sort of misbehaviour in the captives; to restore instantly, *velis levatis* (as the books express it, and as I have often heard Dr Paul quote), if, upon the most summary examination, there don't appear sufficient ground; to condemn finally, if the goods really are prize, against everybody, giving everybody a fair opportunity of being heard. A captor may and must force every person interested may force him to proceed to condemn without delay".

And Lord Stowell says:

"It is to be recollected that this is a court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it is the

administration of the Law of Nations, simply and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which it is well known they have at all times expressed no inconsiderable reluctance".

Let me repeat those words :

And what foreigners have a right to demand from it is the administration of the Law of Nations, simply and exclusively of the introduction of principles borrowed from our own municipal jurisprudence :

Then :

"In forming my judgment, I trust that it has not for a moment escaped my anxious recollection what it is that the duty of my station calls from me, namely, not to deliver occasional and shifting opinions to serve present purposes of particular national interests, but to administer with indifference that justice which the Law of Nations holds out without distinction to independent States, some happening to be neutral and some belligerent ; the seat of judicial authority is indeed locally here, in the belligerent country, according to the known law and practice of nations ; but the law itself has no locality ".

Now, I have further to point out that it is impossible — even if it had been before the learned Judge it would have been impossible—for him upon the grounds now advanced to have entered upon the question in any other light than that in which he did enter upon it, namely, the construction of this municipal Statute. Why? It is now said — and let there be no doubt about the clearness of my enunciation of what is now said — that the right of the United States is based upon the fact of property in seals ; property in, and industry founded upon, seals ; that that property right or interest carries with it further the right to do whatever in the judgment of the nation is reasonably necessary any where — everywhere — to protect that property and that property right. That is the allegation. Let me point out that nowhere was that ever suggested until the parties were preparing to come here to put this case before you ; that their case has been from the first based upon a right restricted in a defined and local area. They say that this Statute is the equivalent of an international regulation for the protection of their own rights. It cannot be so treated. If it is a right that is incident to property, it must follow property wherever property is : but this international regulation embodied under this municipal Statute applies to a defined area, the part of the Behring Sea east of the line of demarcation.

I sum up therefore the whole of my argument on this point by inviting this Tribunal to find, first, the fact of these seizures ; next, the fact that they were seized by the authority of the United States ; next, that they were seized for breach of a municipal Act, and for that cause only ; next that the judgment was claimed, and the judgment was based, upon a breach of that municipal Statute only, and that that municipal Statute purported to prevail and to be effective in a defined area.

If these facts are found (and I have already undertaken to formulate them in a more precise way and to put them in writing for the Tribunal) the conclusions are inevitable that these seizures were unwarranted : that they were an attack upon the equality of Great Britain on the high

seas : that they were unwarranted by the law of nations, the ships of Great Britain on the high seas bring part of the territory of Great Britain : and that an offence has been thereby committed against international law, and against the sovereignty of the Queen, for which we are entitled to demand adequate and just compensation.

Let me guard against a possible misapprehension. The Tribunal will understand that so far I am arguing upon the question, Were these measures justifiable or not. My argument has tended to show that they were not justifiable on the grounds that were then advanced. My argument has further tended to show that even if there were such a right in respect of property — such a right of protection as is now advanced — that that right cannot be invoked in justification of these seizures. The conduct of the United States, the whole tenour of their proceedings, prevents them from being entitled to raise any such question as a justification for such seizure.

But I wish the Court to understand that I do not thereby mean to say that they are shut out from the discussion or the claim of that right. When I come to the larger, the general question, — I have been confining myself, of course, to the question of seizure, as I hope the Tribunal understands, — when I come to the question in its proper order, I will discuss whether any such right exists, and what will be the sanction which by international law, if it existed, could be brought into use in support of that right.

Senator Morgan. — I believe, Sir Charles, you do not claim that the United States is estopped by that decision from going fully into the question.

Sir Charles Russell. — No; that is exactly what I want to convey. I say as regards the question of the justification for those seizures, the United States are not estopped from raising the general question which the Tribunal has to decide.

Senator Morgan. — Then why are they estopped on the question of seizure, if you did not take an appeal?

Sir Charles Russell. — Because they did not profess to act according to international law; because they did not act according to international law; because the Court was not an international Court; because it did not profess to be an international Court; because the case of the United States was put on a different ground, and the Judge acted on a different ground. But I do not suggest that they are estopped from arguing the general question when it comes in the order of these questions which the Tribunal has to decide.

The President. — I suppose you admit that in case the seizures were to be authorized or could be authorized, in your opinion, by other grounds than those indicated in the Judgment, you would not consider that we should be bound to declare the United States answerable?

Sir Charles Russell. — I certainly do, Sir. As regards the seizures which have actually taken place I contend that the United States must rely

upon the case they have themselves presented, and which they have themselves made the basis of the Judgment they invoked from the Court.

Senator Morgan. — If there was an error in the Judgment of the Court, you had your right of appeal to correct it.

Sir Charles Russell. — Except that, as a matter of fact, there was no right of appeal.

Senator Morgan. — None?

Sir Charles Russell. — No. If that be questioned, I can refer to the fact. We gave notice of appeal, and it turned out that the judicial arrangements were in a somewhat rude state in Alaska, and there was no Court to which it could be had at that time.

Senator Morgan. — The case was not beyond the power of prohibition.

Sir Charles Russell. — Now you are touching upon a thorny subject, on which men may well differ. I can only say it was thought by those advising the Government of Her Majesty, or the Canadian Government, that it was worth trying if there could be a prohibition. But Mr Justice Harlan was of a different opinion.

Mr Justice Harlan. — In one of those cases, the appeal taken by the vessel — I think so, but the book will show — was dismissed by the pelagic sealers themselves.

Sir Charles Russell. — On the ground, as I am informed, and as the papers show, that though they gave notice of appeal, it turned out, owing to the imperfection of judicial arrangements then existing — they have been set right since — there was no Court to go to.

Mr Justice Harlan. — Perhaps not the imperfection of judicial arrangements, but the want of proper preparation of the case for an appeal under the Statute.

Sir Charles Russell. — I think not, with deference.

Mr Justice Harlan. — Well, I may be wrong.

Sir Charles Russell. — At all events, if that is a matter that presses on the mind of the Court, I will take care to come furnished with the exact facts, but I think it is not important. It is not a case, as the members of the Court will recognize, of litigation as between subjects, and where the judgment of a Court may work a grievous wrong, which may give rise to the need for diplomatic intervention; in which case it is a diplomatic rule that all modes of possible redress furnished by the judicature of the country should be pursued before diplomacy will intervene. That is a clear rule, but it has never been held to apply to an Act of State, where the contention was, on one side, that the State was acting, or the authority of the State was being invoked, to bind another State outside the limitations of law. My learned friends have not made that point, and it is so bad a point that I do not expect it will be made.

EXAMINATION OF THE FIRST FOUR QUESTIONS OF ART. VI

I come next — and I am very glad to feel I am making some little progress, not as much as I could wish — to the questions 1, 2, 3 and 4 in

Article VI, upon which the Tribunal will remember that whatever position in argument is taken by the learned counsel on one side or the other as to suggesting a greater or less relative importance to those questions, yet that course does not affect the duty of this Tribunal, the obligation, I may respectfully say, of this Tribunal, to decide upon their meaning; because Article VI requires “ that the award of the Arbitrators shall embrace a distinct decision upon each of the said five points ”.

I group those four questions together for an obvious reason of convenience. They naturally hang together. The first deals with the question of Russia's assertions of right; the next deals with the question of Great Britain's recognition of, concession of, those rights; the third deals with the question of whether the Behring Sea was included in the phrase “ Pacific Ocean ” in the Treaty of 1825; and the fourth deals with the transmission by cession of whatever rights Russia had to the United States.

They naturally, therefore, hang together. The first comment I have to make, Mr. President, is this : In view of the present state of this controversy, it must strike you as odd why these questions have been formulated at all; why you should be troubled with the decision of questions which the learned counsel for the United States tell us have no real importance or value at all. Why do I say that? Because they tell us that it does not matter what rights Russia exercised or what rights were conceded to Russia by Great Britain; the right they are standing upon is a right which they have inherent in their territorial dominion; attached to their rights of property interest in the fur-seals or in the industry founded upon the fur-seals; dependent upon no prior action, controlled by no prior action, but simply a right inherent.

But I have first to ask the Tribunal to determine whether that is the question of right at all; it obviously is not one which is referred to in the first of these questions. We are told by my learned friends now, that Russia was not exercising general rights of jurisdiction and sovereignty, but was only protecting by regulations her industry and her property rights. But that is not the question which is raised, and that was not the true character of the claim of Russia at all. Let me just examine that case, for it is necessary in order that the Tribunal should give the correct answer. What is the question? The question is, What exclusive jurisdiction in the sea now known as the Behring Sea, and what exclusive rights in the seal fisheries therein Russia asserted and exercised. It is clear, for the reason that I have given, that it cannot be a right in respect of property or property interest which is adverted to, because, as I have more than once pointed out, such a right in relation to property or property interest as is claimed is not a right which has any legal circumscription at all. It is a right which exists wherever the property is. It is the right of defence of the possession of property against any man who attacks that property wherever that property is, and wherever, therefore, it needs to be defended.

That, therefore, is not the kind of right referred to as the “ exclusive jurisdiction ” of the United States. What then does it mean? It means. What sovereign authority, exclusive of all other Powers, and in a defined and definite area, was exercised by Russia.

In other words, what sovereign authority, exclusive of all other Powers was exercised by Russia in the Behring Sea? That is the character of the question contemplated and put in question one, the first question of Article VI. Exclusive jurisdiction in the Behring Sea: Territorial sovereignty which brooked no rival in that sea. Exclusive in the same sense that there is exclusive territorial dominion on the land. And I must refer to some documents which have not yet, I think, been adverted to, as showing that that was what was meant when this case was originally presented by the United States. I do not know whether any of you gentlemen have ever compared this original Case of the United States as regards the questions put, and the space devoted to the consideration of those questions relatively compared with the space they have assumed in the written argument of counsel, and in the oral argument of counsel. Let me ask your attention to the matter. The whole of this Case on the part of the United States up to page 84 is conversant with what may be called their claim of title; and that claim of title is based wholly upon the rights exercised by Russia as they allege, recognized and conceded by Great Britain as they allege; and to which rights, so recognized and conceded, they in 1867 succeeded by the treaty of that year. It is only at page 85—I pray your attention to this, for it is important — that we find any reference to the claim which now takes so prominent a part in the discussion of the question. After having elaborated the Russian part of their Case, on page 85 is a paragraph which begins thus :

But in determining what right of protection or property this Government has in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside of the ordinary three-mile limit, it is not compelled, neither does it intend, to rest its case altogether upon the jurisdiction over Behring Sea established or exercised by Russia prior and up to the time of the cession of Alaska. It asserts that, quite independently of this jurisdiction, it has a right of protection and property in the fur-seals frequenting the Pribilof Islands when found outside the ordinary three-mile limit.

And here is the whole argument in support of that right, that novel right, as I think it is admitted to be :

And it bases this right upon the established principles of the common and the civil law, upon the practice of nations, upon the laws of natural history, and upon the common interests of mankind.

I have here read every word of the argument in this Case of the United States in support of this claim of protection and property, which is now the great portion of their argument.

Mr Foster. — The next paragraph will throw a little light upon it.

Sir Charles Russell. — Oh, of course they go on to justify that by the

details of seal life ; I am perfectly aware of that. I am talking of argument, Mr Foster. That interruption is needless. I read the next paragraph :

In order that this claim of right of protection and property may be clearly presented, it will be necessary to enter in some detail upon an examination of fur-seal life at the Pribilof Islands and elsewhere, and of the various interests associated with it.

I am dealing with the argument, and not with the statement of facts. I have said from the beginning, and I shall not recede from it, that so far as the decision of the question of property in these animals, free swimming animals in the sea, breeding upon those islands, and spending a considerable part of their life there, is concerned, it depends in our view upon facts that are not in dispute at all. I am dealing with their argument, and here it is. They base this claim “ upon the principles of common and civil law, upon the practice of nations, upon the laws of natural history, and upon the common interests of mankind ”.

But it does not rest there. According to the information which they then had, and which they believed was reliable information, they had got a most valuable body of testimony for the purpose of establishing that Russia had made these claims, and that the concession of these claims had been recognized by Great Britain ; that Russia had asserted these and had acted upon the assertion without contradiction by Great Britain ; and to show that that is so I am led to call attention to the performance of that very astute, but unscrupulous artist, Mr. Ivan Petroff. Will the Court favor me by turning to page 41 of the United States Case? I do not know whether that has been done for you which I have had done for me, but which if done will enable the Tribunal to see at a glance how completely and absolutely the United States have changed front upon this question since the discovery of these forgeries upon which they had based their great case of derivative title from Russia. Cut out these forgeries, and you have no reference to the fur-seals, no assertions by Russia in respect to the waters of the Behring Sea, no acts of interference asserted or suggested by Russia in that sea at all.

The forged translations of the Russian documents.

Now let me just justify this, although it may take a little time, I am afraid.

On page 41 you will see what purports to be a quotation from the Board of Administration of the Russian-American Company, beginning with the words : “ With this precious Act in your hand. ” Every word of that from those words : “ With this precious Act ”, to the end of the page, is a forgery, an interpolation ; and Mr Ivan Petroff understood very well what he was about, because he makes this Ukase of 1821 speak in this language — this is the concluding sentence :

We can now stand upon our rights, and drive from our waters and ports the intruders who threaten to neutralize the benefits and gifts most graciously bestowed upon our Company by His Imperial Majesty.

Turning to the next page you will find a letter from the Board to the Chief Managers of the Colonies beginning “ As to fur-seals ”, down to the word “ future ” at the end of that paragraph — it is all a forgery :

As to fur-seals, however, since our Gracious Sovereign has been pleased to strengthen our claims of jurisdiction and exclusive rights in these waters with his strong hand, we can well afford to reduce the number of seals killed annually, and to patiently await the natural increase resulting therefrom, which will yield us an abundant harvest in the future.

A complete interpolation ; not a reference — I speak subject to correction, but I believe I am right — not a reference in any one document to fur-seals at all. In point of fact we know from the Report of the Committee of the House of Representatives of the United States in 1876, which I referred to before, that in the Russian time the existence of the fur-seal was considered a matter of very little importance ; and it is stated in that Committee’s Report that it had yielded no profit, or no considerable profit at all, during the time of the Russian Government.

Then again on the next page, 43, the Tribunal will observe about the bottom of the page, the words, “ and on the islands and waters situated between them ” — also a forgery ; and a little further down the words, “ The coast of Kamchatka, the Kurile Islands and the intervening waters ” — also a forgery : an interpolation, for the purpose of building up the case, which he thought was the case — and was justified in thinking was the case — which the United States were making. He lends himself to the series of forgeries to build up that case.

Then take the next, which is very remarkable, on page 44. You will observe at the top of the page, the third line, the words, “ And the intervening waters (Behring Sea) ”. Every one of those words is a forgery — interpolated. The original reads thus :

The other ship, however, (sailing from Petropavlovsk), having examined the eastern coast of the Kamchatka peninsula up to 62° of northern latitude, and the west coast of America from this latitude to the island of Unalaska, should proceed to Kodiak and from there to Sitka for the winter.

But this ingenious gentleman makes it read :

From this latitude to the Island of Ounalaska and the intervening waters (Behring Sea) should proceed to Kodiak.

Lord Hannen. — Is that a part of the forgery, “ Behring Sea ”.

Sir Charles Russell. — Yes ; from the word “ and ” to the word “ sea ” inclusive.

I am most anxious that the Tribunal should realize that if these forgeries are cut out of this case of Russia’s assertion and of British concession, there is nothing left : that the whole question resolves itself into the action of the Powers, the United States of America and Great Britain, the assertion in the Ukase of 1821, and upon the consequences of the subsequent session.

Then as to the next quotation on the same page, 44 : it stands in the original thus :

The object of the cruising of two of our armed vessels is the protection of our colonies.....

Lord Hannen. — Where is that comparison of parallel columns?

Sir Charles Russell. — I will give it to you, my Lord. You will find it in the Appendix to the British Counter Case, Vol. I, page 11.

I will occupy one or two moments longer, with the permission of the Tribunal. If the Tribunal will take a note of the page they will see at a glance, because we have underlined the interpolations. But may I, before the Court rises, just call attention to two more. The way he has ingeniously altered the sentence I have just read is to make it run thus :

The object of the cruising of two of our armed vessels..... is the protection of our colonies, and the exclusion of foreign vessels engaged in traffic or industry injurious to the interests of the Russian Company as well as to those of the native inhabitants of those regions.

Then, on the next page, page 45, is a very neat little introduction. It ran originally thus :

By a strict observance of such rules, we may hope to make this industry a permanent and reliable source of income to the Company, without disturbing the price of these valuable skins in the market.

He has improved it, thus :

By a strict observance of such rules, *and a prohibition of all killing of fur-seals at sea or in the passes of the Aleutian Islands*, we may hope to make this industry a permanent and reliable source of income to the Company, without disturbing the price of these valuable skins in the market.

A most ingenious gentleman, this; but I need not say he understood what he was about. He understood the contention perfectly. He realized it most completely.

Then at the bottom of page 46. It originally ran :

and Okhotsk and prohibited them from engaging in trade.

And he has ingeniously altered it, and inserted these words :

and from hunting and fishing in all the waters of Eastern Siberia.

Then he adds boldly a full sentence. Again, this is all his concoction :

In conclusion, it is stated as the decision of His Majesty, the Emperor, in view of possible future complications of this nature, that no contracts involving the free admission or navigation for trade of foreign ships or foreign subjects in the waters adjoining or bounded by the coasts of Russian colonies will be approved by the Imperial Government.

I need not remind you of what is, I think, present in your minds, namely, that in Russian legislation, while Siberia and Kamchatka are spoken of as part of the realm of Russia, Alaska, on the other hand, is always spoken of as a colony of Russia.

Lord Hannen. — How much of that last is interpolated?

Sir Charles Russell. — The last sentence that I read, beginning with the words, “ In conclusion ”, and ending with the words “ Imperial Government ”.

Lord Hannen. — You were giving the passages relied on in the United States Case?

Sir Charles Russell. — Yes, that is my point; I am anxious to bring these passages on which the United States relied to the attention of the Court. I hope the Tribunal realizes the importance of this matter.

The President. — Sir Charles, I would suggest that yesterday you read us a despatch of Mr Blaine, from which it appears that the suggestion of Mr Blaine, and almost his very words, were the origin of these four or five questions put in the sixth Article of the Treaty. Well, I suppose, when Mr Blaine framed these questions in his despatch, and asked that they should be incorporated into a treaty with England, I suppose he relied on some intrinsic arguments of value. Do you think he already had a knowledge of these interpolations of Ivan Petroff?

Sir Charles Russell. — I am not in a position to inform the Tribunal upon that point.

The President. — I think he did know, as these interpolations have been withdrawn by the United States counsel.

Sir Charles Russell. — Certainly, I should judge — it is a mere speculation, and of course my friends would know much better than I — I should judge he had these before him.

Lord Hannen. — That is to say, he had these original translations?

Sir Charles Russell. — Quite so.

Lord Hannen. — And was deceived by them.

Sir Charles Russell. — I should judge so; but I do not know.

Mr Foster. — If it is not an unnecessary interruption, I would explain about that.

The President. — General Foster, will you kindly explain that.

Mr Foster. — With the President's permission. I will say that Mr Blaine had no knowledge whatever of these documents. They were not known to any person in the Department, or any official of the Government of the United States, until after we began to prepare this case, when this person named by Sir Charles was called upon as an expert in the Russian language to translate them.

The President. — It is a question of dates, I suppose, which it is easy to ascertain?

Mr Foster. — As to the translation?

The President. — Of course you know when the translations were made, and when you first had to deal with this Ivan Petroff.

Mr Foster. — As to the matter of dates, they were not known until after the ratification of the Treaty, April 9, 1892.

Mr Justice Harlan. — You mean the existence of the documents?

Mr Foster. — No. These Russian documents were known. The con-

tents of the documents were not known. They had not been translated. All connected with the Department of State, of course, knew that we received from the Russian Government under the Treaty certain archives and documents of the Government of Alaska. Those were sent to Washington and placed in the Department of State. Their contents had never been translated; and as there are very few persons in the United States, or especially in Washington, who are acquainted with the Russian language, the contents were not known to any of the officials of the Department. But the existence of the documents was known, and when this case came to be prepared, it naturally suggested itself to the persons having charge of it that it would be well to examine the contents of those documents, whereupon this man Petroff was employed to translate them.

The President. — But you do not suppose that Mr Blaine, when he originated his suggestion, which had as a conclusion the insertion of the article in the Treaty, relied upon these.

Mr Foster. — It is not a matter of supposition. It is a fact that Mr Blaine did not know what were the contents of these particular documents that are now under discussion.

The President. — Sir Charles, do you not think that would be of some importance for your argument; because, as you are going on about these interpolated documents, and they are practically withdrawn, if they are in themselves quite independent, that is to say, if they are not material for the framing of Article 6 — well, I leave that to you to judge, of course. You know best.

Sir Charles Russell. — I am pursuing this — I did not intend to pursue it at great length — for two reasons : first, to show what was the real meaning of the “ exclusive jurisdiction ” and the “ rights ” mentioned in the first question of Article 6; to show that that meant an exclusive right of territorial sovereignty assumed by Russia, and conceded to Russia — that is my main point : and that at the time this Case was prepared it was the great strength of the case that the United States were prepared to put forward; that that is shown in the way in which it is elaborated here; and, lastly, that excluding these Russian interpolations or forgeries, nothing remains to support the claim based upon Russian assertions, excepting the Ukase and the Treaties in relation to the Ukase.

The President. — So you suppose that, as concerns Mr Blaine, and when he originated these questions, you suppose he relied exclusively upon these documents, but not upon these interpolations.

Sir Charles Russell. — I accept, of course, what Mr Foster says, speaking from his own experience, that Mr Blaine did not know of these documents at the time, and that therefore he was relying upon the view that he took of the Treaties. There are references in his correspondence which I will not now refer to, which I find a little difficulty in accounting for except by reference to some of these documents — I mean as to acts of assertion by Russia, which I do not find vouched for anywhere else except in these documents.

Mr Carter. — Can you point to anything in Mr Blaine's letter indicating that he knew of the contents of these documents?

Sir Charles Russell. — No; I do not say these documents. I do not doubt Mr Forster's statement in the least upon the subject; but Mr Blaine must have had some idea that there were in existence documents which would support the statements that there were acts of assertion by Russia which could be relied upon.

Mr Foster. — Why did he not produce them at the time?

Sir Charles Russell. — I think you will find, if you read his letter, that he speaks again and again of acts of authority by Russia, assented to by Great Britain.

May I be permitted to make one suggestion which would, I think, have the very desirable result of cutting short my argument upon this part of the case. You see, the United States have withdrawn the forged documents, and presented re-translations. They have not altered the Case as it was originally presented. I have had enclosed for me in red brackets the interpolated passages in the Case, and if it would be permissible I can get that done as regards each of the Cases of the Arbitrators, so that they can see at a glance the important part — I consider it is important — that these interpolated passages bear in the argument, and how bare it stands of authority if those interpolated passages are excluded.

Lord Hannen. — That is what you are going to show next?

Sir Charles Russell. — Yes.

Lord Hannen. — Taking out the interpolated passages there does not remain the foundation for the claim of a derivative title from Russia?

Sir Charles Russell. — That is it.

Mr Justice Harlan. — So much of the case as rested on those documents that contain the interpolations, has been formally withdrawn by the United States?

Sir Charles Russell. — Oh, that goes without saying, of course.

Mr Justice Harlan. — I understood you to say otherwise; that is the reason I interposed. Somebody said the Case had not been modified by reason of that. I simply respond to that.

Sir Charles Russell. — My friend merely meant that from the physical Case the passages had not been excised.

Mr Phelps. — The Case is re-stated in the Counter Case.

Sir Charles Russell. — Yes.

The Tribunal here adjourned until Tuesday, May 16, 1893, at 11.30 o'clock A. M.

TWENTY-THIRD DAY. MAY 16TH, 1893

Sir Charles Russell. — Mr President and Gentlemen, I resume my argument upon the construction of the first question in Article VI; and, before doing so, I wish for one brief moment to refer to a matter which I am afraid, and I am sorry to find, has caused some irritation to my learned friends on the other side; I mean the reference to the falsification of certain documents which appear in the original case. I wish our position in that regard to be made quite clear to the Tribunal. We do not in the least suggest, and never have suggested, that those who represent the interests of the United States were in any way blameworthy in that matter; they were simply deceived; and we accept, as I think I said before, implicitly the statement of General Foster, that when Mr Blaine was conducting his diplomatic correspondence he was not aware of the contents of these Russian documents. But we thought it necessary, and we still think it necessary, to call attention to that fact in order to show that, according to our view, the case — the substantial case — originally presented on the part of the United States was a case of territorial jurisdiction in Behring Sea, territorial dominion in Behring Sea; and that once these falsified documents are expunged the whole of that question depends upon the construction of the Ukase of 1821, the action following on that Ukase, and upon the construction of the Treaties of 1824 and 1825. We feel it necessary to call attention to those falsifications and to suggest — we may be right or we may be wrong, but it is the view that we submit on this matter — that it is the discovery of these falsifications by which the representatives of the United States were deceived which has led to their change of front; — namely, the change, on which I have already dwelt at such length, by which the question of derivative title under Russia, the question of territorial dominion exercised by Russia, has receded into the background to make room for the different case now presented.

I called attention at the last sitting to the case of territorial dominion which was originally presented on the part of the United States. I showed that that case was consistent with the attitude which the United States had pursued: that it was consistent with the course which the Executive had pursued: that in invoking the aid of their municipal statute as they did they were proceeding on the notion of territorial dominion, and the application within that territorial dominion of their municipal statute, and of that municipal statute alone; and that there was no trace to be found in the proceedings of a suggestion of the exercise of an inherent protective right of property or of property interest. I am

not going to enlarge upon the subject again, but I observe in passing that I did call attention, in connection with those proceedings in the Alaska Court, to two circumstances which make our position still more apparent.

The first circumstance I called attention to was this. It was said that although this Alaska Court is a municipal Court, yet it had also Prize Court or International Court functions. I will not stop to question that; but what I desire to point out is this, that once it exercises or purports to exercise international functions, then the law which it has to administer is something entirely different from the law it has to administer as a municipal Court. Let me explain that point, and pass on. Let me assume for a moment that the Counsel for the United States, in those proceedings, had said to the judge: "We are claiming that you, this Court, shall exercise functions as an international tribunal, as a Prize Court, and that you shall proceed to pass judgment upon the question whether this seizure for the cause that we allege was justified by International Law."

What would have been the first thing that the Judge must have done when that contention was put before him? The first thing he must have done would be to say this: "Then if I am sitting in an international Court, and exercising the functions of a Prize Court, municipal law is not my guide."

I will take the ground my learned friends put when they say they are entitled to do anything, within certain reasonable limits, necessary for the protection of their property and of their interests. Immediately the Judge would be obliged to consider — would necessarily be face to face with the consideration — whether international law, under such circumstances, justified the seizure at all; and, in the next place, whether international law annexed to the offence, alleged to have been committed against international law, the particular sanction of search and seizure of the vessel which the Government had adopted, to say nothing of the further sanctions of imprisonment of the men and confiscation of the vessels which that Government demanded. But there is not a trace of the suggestion in the whole of the judgment or in the brief to which I have already referred, that the Judge was asked to consider the question in any other aspect than that of municipal law.

Now since I am upon this, and it is also relevant to the character of the right — the exclusive jurisdiction and the exclusive rights referred to in question 1 — I have followed up to the end these proceedings in the "Sayward" Case, and I have before me here — Mr Justice Harlan will recognize it — the shorthand report of the argument of the Solicitor General of the United States, who appeared before the Supreme Court at Washington in answer to an application for a prohibition; and I beg the Tribunal to recollect that this brings us down to a period as late as 1892, last year, at the time when the Treaty was being discussed; and I will read to the Court the ground upon which that learned gentleman in a very able argument puts the case of the United

States. I will hand this copy of the proceedings in the case, if it is not already in the possession of the Tribunal, to any member who wishes it. I read from page 54; this is the Argument. “What we say from that” (— that is, after he has stated the municipal legislation and the derivative title under Russia) — “is that all the territorial jurisdiction of the United States acquired from Russia is included within the jurisdiction of the Alaska Court, and is equally within the limitation of section 1956, and that if rights were acquired in Behring Sea by the cession from Russia — and no rights were otherwise acquired — that section 1956 extends over all the territory or dominion which was acquired by that treaty of cession. We do not deny that the jurisdiction of the District Court of Alaska and that the venue of the offence were originally questions to be decided by that Court, and to be decided by this Court in a proper case when properly here raised. What we assert is that the jurisdiction of that Court, and the venue of the offence, by a single step is made inevitably to depend upon the national jurisdiction in the waters of Behring Sea: that that is a political question, and that the decision of the Executive and of the Congress of the United States on that political question is conclusive, not only upon this Court but upon every citizen within the jurisdiction of the country, because in determining that political question the Executive is discharging his constitutional functions, and he, in the discharge of that duty, is not an inferior tribunal whose decision may be reversed by this Court.”

The Court will see that it could not have been present to the mind of this learned gentleman that there was any ground put forward suggesting a defensibility of the judgment, except the ground of national territorial jurisdiction, on which he affirms are based the only rights put forward by the United States, and which he says were the only rights that were acquired from Russia by the United States. The Attorney-General follows, but follows briefly upon the same lines; and I turn to the judgment, and (Mr Justice Harlan will correct me if I am wrong about this) I take the effect of the judgment ultimately to be this; that the Court thought that it was not a case in which a Prohibition lay; that they came to the conclusion that the Record had been so imperfectly made up that even if jurisdiction did not extend beyond 3 miles, yet *non constat*, as far as the Record as made up appeared, the offence may not have been committed within 3 miles.

Mr Justice Harlan. — I really do not recall enough of it to say whether you are correct or not. Have you the opinion of the Court?

Sir Charles Russell. — Yes; I have it before me.

I do not know if the other Members of the Court appreciate what I am upon. Jurisdiction in prohibition is a peculiar thing. It is difficult to put prohibition in force after the judgment has passed. The point resolves itself into a question whether the Court had any jurisdiction; and, if it had any jurisdiction, then the remedy if the Court has gone wrong is not prohibition, but appeal. If it had jurisdiction, you cannot prohibit; and the Court came to the conclusion, from the Record put before them,

imperfectly and very badly made up it would appear, that it did not appear that the seizure might not have been within the 3-mile limit, and, therefore, properly within the jurisdiction, as internationally recognized, of the municipal Courts.

But that is not the point I am upon, which is the recognition by the Court of the argument of the Solicitor-General on the broad grounds on which the United States assumed to justify their action. The judgment is on page 16 of the Official Report —

Mr Justice Harlan. — That is the opinion of the Chief Justice?

Sir Charles Russell. — Yes.

If we assume that the record shows the locality of the alleged offence and seizure as stated, it also shows that officers of the United States, acting under the orders of their Government, seized this vessel engaged in catching seal and took her into the nearest port, and that the law officers of the government libelled her and proceeded against her for the violation of the laws of the United States, in the District Court, resulting in her condemnation?

How did it happen that the officers received such orders? It must be admitted that they were given in the assertion on the part of this government of territorial jurisdiction over Behring Sea to an extent exceeding fifty-nine miles from the shores of Alaska; that this territorial jurisdiction, in the enforcement of the laws protecting seal fisheries, was asserted by actual seizures during the seasons of 1886, 1887, and 1889, of a number of British vessels; that the government persistently maintains that such jurisdiction belongs to it, based not only on the peculiar nature of the seal fisheries and the property of the government in them, but also upon the position that this jurisdiction was asserted by Russia for more than 90 years, and by that government transferred to the United States; and that negotiations are pending upon the subject.

Therefore, the Chief Justice appreciates it in the same sense; he could not do otherwise.

That the government persistently maintains that such jurisdiction belongs to it, based not only on the peculiar nature of the seal fisheries and the property of the government in them, but also upon the position that this jurisdiction was asserted by Russia for more than ninety years.

The President. — What does he mean by “extending 59 miles”, that is where the seizure was, I suppose?

Sir Charles Russell. — Yes. As regards the technical ground of the Judgment he says on page 28 :

Upon the face of the libel and findings, if the jurisdiction did not extend beyond three miles from the shore, the legal inference is that the offence and seizure were within that limit.

That is the technical ground, but not the broader ground which I am at present upon.

Now if it were, as it is apparent it must be, the true meaning that the jurisdiction exercised by Russia was territorial dominion, then I have to show that the United States admit now at this stage of the controversy that the question must be answered in the sense for which Great Britain contends. Now I proceed to justify that statement, and for that

purpose I refer to the Case of the United States. Now in order to bring this out, in order to contrast the different aspects of their contention, it is enough to say that in the original Case their propositions were these. I am reading now from the "Conclusions" at page 297 :

That prior to the Treaty of 1825 between Great Britain and Russia, and from a date as early as 1799, down to the cession to the United States in 1867, Russia prohibited the killing of seals in any of the waters of Behring Sea, and exercised such control therein as was necessary to enforce such prohibition.

Fifth. That Behring Sea was not included in the phrase Pacific Ocean, as used in the Treaty of 1825, and that said Treaty recognized the rightfulness of the control exercised by Russia in Behring Sea for the protection of seals.

Sixth. That all the rights of Russia as to the protection of the Alaskan seal herd passed unimpaired to the United States by the Treaty of 1867 —

and so on.

Then the final conclusions, at the bottom of page 301, are these :

In conclusion the United States invoke the judgment of this High Tribunal to the effect :

First. That prior and up to the time of the cession of Alaska to the United States, Russia asserted and exercised an exclusive right to the seal fisheries in the waters of Behring Sea, and also asserted and exercised throughout that sea the right to prevent by the employment, when necessary, of reasonable force any invasion of such exclusive right.

That Great Britain, not having at any time resisted or objected to such assertions of exclusive right, or to such exercise of power, is to be deemed as having recognized and assented to the same.

Then in another form is repeated the Behring Sea and Pacific Ocean question; and then finally it is stated that the rights of Russia passed to the United States.

Now their present position is stated briefly on page 49 of their Counter-Case. The marginal note to that column is this : " No exclusive territorial jurisdiction claimed ;" and the statement in the body is in these words :

The distinction between the right of exclusive territorial jurisdiction over Behring Sea, on the one hand, and the right of a nation, on the other hand, to preserve for the use of its citizens its interests on land by the adoption of all necessary, even though they be somewhat unusual, measures, whether on land or at sea, is so broad as to require no further exposition. It is the latter right, not the former, that the United States contend to have been exercised, first by Russia, and later by themselves.

Therefore, it follows from this statement that it is not a question of exclusive jurisdiction in the sea, because exclusive jurisdiction in the sea means, as I pointed out on a previous occasion, a jurisdiction exclusive of all other Powers — a right to say to all other Powers and persons "You shall not enter here if it is our will that you shall not enter here". That is sovereign jurisdiction; it involves treating the area to which that assertion relates as if it were territory, because, as I pointed out on a previous occasion, such a right as the one which is now asserted, to defend a special property interest, is not a right exercisable in a defined

area; it is a right which, if it exists—(whether it exists and what its true character is I will discuss hereafter) — would exist and be exercisable wherever the property to be defended existed and at the time was. It, therefore, would have no local area of circumscription at all.

But, further, let me draw the attention of the Arbitrators to the form of question 4 :

Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea, east of the water boundary in the Treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that Treaty?

The Tribunal will notice those words “ pass unimpaired ”. That is clearly referring to a right of jurisdiction, a right of territorial jurisdiction; because how could it be suggested that if it is a right of protection of property, incident to property, there could be any question of that being impaired?

Such a right would come into existence when the right itself came into existence, and would exist as long as the right itself existed. There could be no question of a derivative title to protection in the property if it existed at all; or of its passing unimpaired. Therefore, that question again throws light on what the meaning of the first of these three questions is, namely, an assertion of territorial sovereignty by the United States. That it was exclusive jurisdiction in a limited area, and not a general right which follows property wherever it is, is further shown by the *modus vivendi*. The *modus vivendi* stipulates that if the result of the Arbitration be to affirm the right of British sealers to take seals in Behring Sea, then the United States is to compensate Great Britain; if, on the other hand, the result of the Arbitration should be that Great Britain has no right to take seals in Behring Sea, then that Great Britain is to compensate the United States for this loss; again showing jurisdiction in a limited area — jurisdiction in the eastern part of Behring Sea. Now it is important for us to follow this out, (although it is, in the view of my learned friends, no more than a subordinate question), because it shows that which I must again and again and again refer to and recur to — that the claim of the United States is essentially a territorial claim, and because it shows also that the whole area of dispute between these parties, (which is the limitation, as we contend, of the authority of this Tribunal), is limited to the area of Behring Sea.

There is one other general observation which I have to present, and then I pass on. It will be observed that the third question deals specifically with the point raised by Mr Blaine in his celebrated letter of December 17, 1890, which he said, if decided in one way, was conclusive of the question : namely, whether Behring Sea was included in the phrase “ Pacific Ocean ”. I observe on that in passing, that if that question is answered in the sense for which we contend, namely, that Behring Sea was included in the phrase “ Pacific Ocean ” in the treaties, then all the first four questions are answered in the sense favorable to Great

Britain; because if, by the operation of the Treaties, Russia did in fact recognize, without qualification, rights of fishing in Behring Sea, then it cannot be said that she asserted and exercised exclusive rights, when by the Treaties she had disclaimed them. I hope the Tribunal follows this point. If the effect of the Treaties is to recognize the right of Great Britain and its nationals, as well indeed as of other Powers of the world, to navigate and fish without limitation in Behring Sea, then of course Russia cannot be said to have asserted and exercised a right which is inconsistent with that recognition.

Now with those observations I pass to the consideration of the matter a little more closely. In considering these questions I do not forget the observation “cutely” made, if I may respectfully say so, by Senator Morgan, a good many days ago, namely that it is not a question what rights Russia had in fact, but that it is what rights Russia asserted and exercised. That is quite true; but, of course, in considering what rights Russia did, in fact, assert and exercise, it is not unimportant to consider, in a very general way, what would have been the effect and the character of the assertion of any such right, and what was the extent of the locality, the extent of the area, in which those rights of an exclusive kind were said to have been exercised. Now upon this part of the case I can be very brief. I will not trouble the Tribunal to refer to the documents for the moment. It will not be found to be necessary even to supplement in any way the admirable, graphic, picturesque, introductory historical sketch which my friend, Mr Carter, gave the Tribunal in his argument — a very interesting part indeed of his argument.

There were some statements in the course of that narration with which we do not agree, but there is nothing essential to the question between us. The Behring Sea is the northern part of the Pacific Ocean; it washes the north-west portion of the coast of America and changes its name at the sea of Okhotsk. In the extreme west it washes the north-eastern part of Asia.

It is the sea that connects the broad Pacific Ocean with the Arctic Ocean by the Behring Straits, some 48 miles in width. From east to west that sea — it is before your eyes upon the map — has an extreme width of 1260 miles. From north to south it extends over 14 degrees of latitude, exceeding 800 miles; and the area of that sea is stated in the United States Case (and I have no doubt quite correctly) to amount to nearly 900,000 square miles. That is the character of the sea. Prior to 1799 it is perfectly true to say that it was one of the vast and partially unexplored seas of the world. It had begun to be navigated by all nations, but not to a very large extent. There had been Russian, American, English and French travellers over various parts of the bordering country. The general description of these expeditions is to be found in the historical outline which is presented in the British Case from pages 14 to 21.

I do not stop to read them, because it is not important, but by the beginning of the 19th century undoubtedly, the regions in this neigh

bourhood, and the regions of land beyond — in the almost practically unknown Arctic ocean, — had excited the interest and the desire for exploration in the adventurous among men : *omne ignotum pro magnifico*. Eyes were turned on these undiscovered regions. The country both south and east of Behring Sea being very sparsely populated, and almost entirely by the aboriginal population, it had not assumed any great commercial value as a pathway of commerce. There had been no important settlements on the American coast, and the questions of what right Russia had acquired by discovery, or by possession, were of a largely indeterminate character. That, broadly stated, was the position of things when the Ukase of 1799 was promulgated by Russia.

THE UKASE OF 1799.

Upon this Ukase I must say a word, although again it is not necessary to trouble the Tribunal by referring to any particular document in relation to it. Legislation by Ukase I take to be the mode which the Constitution, or the system of Government I had perhaps better say, of Russia, employs for conveying its sovereign will. That Ukase of 1799 has, I think been a little misstated by my friends on the other side. Its history is given in the British Case; the Ukase itself is on page 25. I may dispose of it as far as I am concerned by very general observations. In truth this Ukase was aimed at consolidating the rival Russian interests concerned in the trade in the Russian possessions upon the American coast. It was not directed against foreigners — indeed there were very few foreigners against whom it could be directed at that time. It shows that it was aimed at consolidating local Russian interests in one powerful monopoly; which one powerful monopoly should, by its strength and its own inherent force be able to resist possible competition, signs of which were beginning to grow up. In that sense undoubtedly it was aimed at foreigners, but in that sense only.

Now it begins by a statement of the claim of Russia by right of discovery; and then it goes on, in clause 1, to say :

We most graciously permit the company to have the use of all hunting grounds and establishments now existing on the north-eastern —

that ought to be *north western* —

coast of America from the above-mentioned 55th degree to Behring Strait and on the same also on the Aleutian, Kurile, and other islands situated in the north — eastern ocean.

Clause 2 relates to making new discoveries, which I need not read.

The remaining important clauses are as follows :

3. To use and profit by everything which has been or shall be discovered in those localities, on the surface and in the bosom of the earth, without any competition by others.

5. To extend their navigation to all adjoining nations and hold business intercourse with all surrounding powers under our highest protection to enable them to prosecute their enterprises with greater force and advantage.

6. To employ for navigation, hunting, and all other business, free and unsuspected people —

and so on.

8. For shooting animals, for marine signals, and on all unexpected emergencies on the mainland of America and on the islands, the Company is permitted to buy for cash at cost price, from the Government artillery magazine at Irkutsk, yearly so many pouds of powder —

and so on.

10. The exclusive right most graciously granted to the company for a period of 20 years, to use and enjoy, in the above described extent of country and islands, all profits and advantages derived from hunting, trade, industries, and discovery of new lands prohibiting the enjoyment of those profits and advantages not only to those who would wish to sail to those countries on their own account, but to all former hunters and trappers.

Now this is the chief passage which I desire to read in order to show what the purport of the article was ; it is in the middle of article 10.

And other companies which may have been formed will not be allowed to continue their business unless they unite with the present company with their free consent ; but such private companies or traders as have their vessels in those regions can either sell their property, or, with the company's consent remain, until they have obtained a cargo —

and so on. Then further on it says :

And after that nobody will have any privileges but this one Company, which will be protected in the enjoyment of all the advantages mentioned.

That therefore was the creation of a Russian Monopoly Company, which should have all rights of trade in the territories which Russia either possessed or was claiming to possess by its right of discovery. It applied to all other Russian subjects — excluded all other Russian subjects ; but there is not a word about foreigners in it from beginning to end. But that is not the most important part. The Tribunal will observe that there is not one syllable about the sea in it, and not one word about exclusive rights of fishing in Behring Sea.

Mr Justice Harlan. — Sir Charles, will you let me remind you here that in the British Counter-Case it is said that the translation you have just read is incorrect, and you give another translation of it which you say is the correct literal one. I want to ask you, is there any material difference.

Sir Charles Russell. — None, sir, I believe.

Lord Hannen. — Only in one phrase I think, in which the word “ dominion ” is used.

Mr Justice Harlan. — The differences are indicated in the Counter-Case by italics. I do not know whether there is any proof in the documents as to which is the correct translation.

Sir Richard Webster. — It arose in this way. This translation was

simply taken from Bancroft's History of Alaska. The original Ukase had never been translated till after the British Case was deposited, and then it was translated for greater accuracy, and that more correct translation was printed. As the Attorney General said, there are no substantial differences which require any notice.

Sir Charles Russell. — I think it will be found that is so. As I have already observed, it is domestic in its character, and indeed affirms a strong domestic monopoly which could successfully contend with other rivals, and in that sense undoubtedly with foreign rivals, if they appeared; and it relates solely to land. It has no reference to the question of sea rights, or of interference with sea rights. It is entirely domestic in its character, and there is no suggestion of a notification to any foreign Power.

It will be seen, at the bottom of page 28 of the Case, that the view I am suggesting is the view which prevailed in 1824 in the United States. Referring to the Ukase of 1799, Mr Middleton, writing to Mr John Quincy Adams, says :

The confusion prevailing in Europe in 1799 permitted Russia (who alone seems to have kept her attention fixed upon this interest during that period) to take a decided step towards the monopoly of this trade, by the Ukase of that date, which trespassed upon the acknowledged rights of Spain.

That is as regards territory, you will recollect.

But at that moment the Emperor Paul had declared war against that country as being an ally of France. This Ukase, which is, in its *form*, an act purely domestic, was never notified to any foreign State with injunction to respect its provisions. Accordingly, it appears to have been passed over unobserved by foreign Powers, and it remained without execution in so far as it militated against their rights.

That was the United States view of it.

THE UKASE OF 1821

Now, I pass to the much more important document, the Ukase of 1821; and the Tribunal will observe that, at this period, the question of seal-fishing, either on Islands or in the open sea, had not assumed any importance. No doubt, the natives along the coast had been catching all they could for their clothing and for their sustenance, and no doubt barter had begun to spring up as early as that period, though it would be mainly south of the Aleutian Chain, but we have no record of any existing, to any extent, north of the Aleutians. Now comes this important document, the Ukase of 1821, which is set out in volume I of the Appendix to the United States' Case, at page 46 :

Edict of his Imperial Majesty, Autocrat of all the Russias.

The Directing Senate maketh known unto all men. Whereas in an Edict of his Imperial Majesty, issued to the Directing Senate on the 4th day of September, and signed by his Imperial Majesty's own hand, it is thus expressed :

'Observing from reports submitted to us that the trade of our subjects on the

Aleutian Islands and on the northwest coast of America appertaining unto Russia, is subjected, because of secret and illicit traffic, to oppression and impediments; and finding that the principal cause of these difficulties is the want of rules establishing the boundaries for navigation along these coasts, and the order of naval communication as well in these places as on the whole of the eastern coast of Siberia and the Kurile Islands, we have deemed it necessary —,

and so forth.

Now, before I proceed to read the operative parts of this document, may I invite the attention of the Tribunal seriously to my learned friend Mr Carter's contention in relation to this Ukase, and the effect of that Ukase upon the Treaties of 1824 and 1825; because it will save me a good deal of repetition and argument if the Tribunal will bear in mind that the whole of the discussion in which I am now embarking will be addressed not merely to showing that the right of fishing was recognized in the Behring Sea, but also to showing that the phrase « northwest coast of America » had not the limited meaning in the Treaties and in the correspondence which my learned friend, Mr Carter, assigned to it, but extended to the whole of the coast-line of the possessions claimed by Russia from Behring Strait down to its most southern boundary.

In order that the Tribunal may have this point more clearly before it, let me remind the Tribunal what my friend Mr Carter's argument was. The argument was that north of the Aleutian Chain in Behring Sea, and north of Behring Sea, the rights of Russia never were questioned at all — that the debatable ground was not reached until you came south of the Aleutians.

Mr Carter. — South and east.

Sir Charles Russell. — Oh yes, of course.

Mr Carter. — Not much south.

Sir Charles Russell. — South and east of the Aleutians; but that south and east of the Aleutians Russian pretensions were met by certain more or less undefined claims on the part of Great Britain, and by certain more or less undefined claims to territory on the part of the United States: that all the dispute related to portions of sea and territory south of the Aleutian Chain; and that the north west-coast — and this is the main point — in the sense in which it was used in the Ukase, in the sense in which it was used in the Treaties, referred only and strictly to the *lisière*, as ultimately defined in the Treaty of 1825. Now having stated that correctly as my learned friend's contention, I do not stop to point out, though I may have to do it later, that my learned friend has given one of four different interpretations which have been advanced by the United States as to the meaning of that phrase “ northwest coast ”. It will be convenient for me here to mention what those four interpretations were. I will not stop to justify this assertion now; but I think it will be apparent when I come to read the correspondence.

Mr Carter. — I referred to the limitation of the words “ northwest coast ” as used in the Ukase.

Sir Charles Russell. — Very well; I am obliged to my learned friend for correcting me; as used in the Ukase, it was much more.

Mr Carter. — I did not say that.

Sir Charles Russell. — If it was not confined to the *lisière*, it extended beyond it, and, therefore, meant more than the *lisière*.

Mr Carter. — I only spoke of what my argument was.

Sir Charles Russell. — I now point out what these four constructions were. In the despatch to Sir Julian Pauncefote of the 30th of June, 1890, Mr Blaine examined the Treaties of 1824 and 1825, and says it is plain that they both limited the “ northwest coast ” to the coast between the 50th and 60th degrees of North latitude.

[Sir Richard Webster then pointed it out on the map.]

On the 17th of December, 1890, he again writes, and discusses the meaning of “ Pacific Ocean ” and “ the Northwest coast ”; and he observes in that letter that the dispute as to the meaning of “ Pacific Ocean ” prominently involves the meaning of “ the Northwest coast ”; and, in that letter he contends that “ the Northwest coast ” means the coast from the 42nd to the 60th degrees of North latitude.

[Sir Richard Webster then pointed it out on the map.]

I observe, in passing, that neither of those contentions has been thought worth inserting in the United States’ Case or Counter-Case.

A third construction suggested is that it is identical with the *lisière*.

The fourth construction is put forward in the United States’ Case at page 26, where they say that the term “ Northwest coast ” is intended to designate the coast between Prince William’s Sound and the mouth of the Columbia River.

[Sir Richard Webster then pointed it out on the map.]

Those four meanings have been given by the United States to that phrase “ Northwest coast ”.

Now, I will ask the attention of the Tribunal to what it really means.

I agree fully with Mr Blaine that the two phrases “ Northwest coast ” and “ Pacific Ocean ” have a very important bearing indeed on the question whether Behring Sea was not included in the phrase “ Pacific Ocean ”. First of all, of course, it is important to see, inasmuch as the Treaties of 1824 and 1825 were the result of the protests, up to a certain point joint, and after that separate, of the United States and of Great Britain it is important, of course, to see what was the assertion, on the part of Russia, of jurisdiction against which these protests were jointly and severally made. I turn to the Ukase.

It is set out on page 16 of volume I of the Appendix to the United States Case.

Rules established for the limits of navigation and order of communication along the coast of Eastern Siberia, the Northwest Coast of America, and the Aleutian, Kurile and other Islands.

If the Tribunal will follow this on the map, it will be seen that tha

describes a circle. It is made still clearer in section I. “ The pursuits of commerce, whaling and fishery ”, — you will observe that, though my friends say that this Ukase was for the protection of fur-seals, there is no reference in it to fur-seals at all; but there is a reference to other forms of fishing.

The pursuits of commerce, whaling, and fishery, and of all other industry on all islands, ports and gulfs including the whole of the northwest coast of America, beginning from Behring's Straits to the 51° of northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring's Straits to the South Cape of the Island of Urup, namely, to the 45°50 northern latitude, is exclusively granted to Russian subjects.

Again, the Tribunal will see that the whole line of that coast is indicated by the general description of Russian assertion of dominion. On the western side of the Behring Sea, and on the coast of Siberia, from Behring Straits along the coast down to 45°50 of latitude; on the American side from Behring Straits to 51° of northern latitude, described as the « northwest coast of America ». Now that is unmistakeable.

It is therefore prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia as stated above, but also to approach them within less than a hundred Italian miles. The transgressor's vessel is subject to confiscation along with the whole cargo.

Now, let me point out, Mr President, when my learned friends say the Treaties of 1824 and of 1825 left Behring Sea untouched, and that Behring Sea was not included in the phrase “ Pacific Ocean, ” that if it was untouched, so far as Behring Sea is concerned, it must have been a closed sea, a *mare clausum* : because there is no opening into Behring Sea from the south or from the north that exceeds 200 miles. You will find, on page 47 of our Counter-Case, the exact width of all the passes is given, and the greatest pass is that between Attu Island and Copper Island, which is 190 miles only. If the jurisdiction is extended 100 miles from each of the Islands, the two zones, of course, meet, and the sea becomes a *mare clausum*.

I do not think there is a great deal to be said in calling attention to the details of the Rules issued with this Ukase, but there are two or three to which I must refer. Section 3 requires to be noticed.

Mr Justice Harlan. — The Cases of both Governments agree in the translation of section 1 which you have read; but I observe that in a letter of Mr Blaine to Sir Julian Pauncefote, at page 226 of the United States' Appendix, volume I, he gives sections 1 and 2 of the Ukase of 1821; and it differs from the one you have read. I do not know where he got his translation. There seems to be no reference to it anywhere.

Sir Charles Russell. — Does it materially differ?

Mr Justice Harlan. — Well, there is some change of phraseology. Instead of the words “ including the whole of the northwest coast of America ”, it reads “ and in general, all along the north-western coast of America ”. The translation you have read contains the words “ from

the Aleutian Islands to the eastern coast of Siberia", while Mr Blaine's translation reads, "on the Aleutian Islands and along the eastern coast of Siberia."

Sir Charles Russell. — I do not know where he got it from. It does not seem very important.

Mr Justice Harlan. — No; I do not know that it is.

Sir Charles Russell. — It would seem to put it rather stronger : — "And, in general, all along the north-western coast of America from Behring Strait." It is stronger, but not material; but I take the translation that the United States have put forward themselves. I am reminded by my learned friend that we have put forward one which agrees with it.

Mr Justice Harlan. — Exactly. Both Governments have presented the same translation in the present case.

Sir Charles Russell. — So I understand.

I was calling attention to section 3, which shows there is no doubt about what was meant in section 1; namely, the power of excluding every body from the area in sections 1 and 2, because in section 3 an exception is made.

In favour of vessels carried thither by heavy gales or real want of provisions, and unable to make any other shore but such as belongs to Russia. In these cases they are obliged to produce convincing proofs of actual reason for such an exception. Ships of friendly governments merely on discoveries are likewise exempt from the foregoing rule.

Then section 14, on page 18 :

It is likewise interdicted to foreign ships to carry on any traffic or barter with the natives of the islands, and of the northwest coast of America, in the whole extent hereabove mentioned. A ship convicted of this trade shall be confiscated.

Then, section 25 I do not know that that is very important to trouble you with; but it is :

In case a ship of the Russian Imperial Navy, or one belonging to the Russian American Company, meet a foreign vessel on the above-stated coasts, in harbours, or roads, within the before-mentioned limits, and the Commander find grounds by the present regulation that the ship be liable to seizure, he is to act as follows —

And then there are indications as to how he is to act. Then I pass over several pages, and in section 60 more or less elaborate provisions are made for dealing with the proceeds of confiscated property, vessels and cargo, as to which four-fifths are to go, after certain deductions, to the American Company. The President will recollect that the American Company was not an American Company with American citizens in it; it was so called from its trading partly in America; and so far from being an American Company, the papers state, and I think it is correct, that a number of distinguished persons in Russian political life, including members of the Royal Family, were interested in that Company.

There can be no question, Mr President, between us as to what that

Ukase means. It means an assertion of exclusive territorial dominion in the territory mentioned to the extent mentioned and in the seas mentioned, so as to prohibit navigation within 100 miles from the coast. That is a very different thing from the charter of 1799, which was not communicated to any foreign Power. This Ukase was—

Mr Justice Harlan. — You say “to the extent mentioned.” Do you mean over the whole of Behring Sea, or for 100 miles?

Sir Charles Russell. — So far as territorial jurisdiction is concerned, 100 miles from the land and the islands, of course. But as I have pointed out this would have closed the entrance to Behring Sea. The Charter of 1821 you will find on page 24. It is not necessary that I should trouble you with it beyond reading sections 1 and 2. The Ukase was an act of imperial legislation. The Charter is the act by which, upon the basis and under the protection of that imperial legislation, the rights are given to the chartered Company.

The Company established for carrying on industries and trade on the mainland of north-west America, on the Aleutian, and on the Kurile Islands, remains as heretofore under the highest protection of His Imperial Majesty.

It enjoys the privilege of hunting and fishing to the exclusion of all other Russian and foreign subjects throughout the territories long since in the possession of Russia, on the coasts of north-west America, beginning at the northern point of the island of Vancouver in latitude 51° north, and extending to Behring Strait and beyond, as well as on all islands adjoining this coast and all those situated between this coast and the eastern shore of Siberia, as well as on the Kurile Islands, where the Company has engaged in hunting down to the south cape of the Island Urupa, in latitude 43°50'.

Sir Richard Webster. — The translations there do not quite agree, but it is sufficiently accurate in the United States' Case.

Sir Charles Russell. — Now, still endeavouring not to distract the attention of the Tribunal by references to too many books, I would ask you to turn to page 132 in this same volume. How far have we got in the argument? We have got clearly to the point of a distinct assertion of territorial dominion of a very extended kind by Russia, and of territorial jurisdiction of an exclusive character, extending 100 miles from land and from the islands; which is of course a claim to exclude all persons from that extended area.

Nature of the claim
made in the Ukase
of 1821.

The President. — You seem to construe the last clause of the Ukase of 1821 as implying an extension by Russia of the territorial limit.

Sir Charles Russell. — Yes and so it was.

The President. — Not of particular jurisdiction, but as an extension of general territorial right of Russia.

Sir Charles Russell. — Certainly there is a distinct prohibition of any vessel going inside that line, with the penalty of being confiscated if it does go within: with the only exception in favour of a vessel blown within by accident or stress of weather. It is a claim to exclude all persons from coming within that limit. It is an extension to 100 miles of the now universally accepted 3 miles limit.

Lord Hannen. — I understood you to say you thought the effect of it

would be to prevent any vessel going into Behring Sea at all because they would infringe the 100 miles.

Sir Charles Russell. — Yes I did. There is the permission given, which does not detract from the assertion of territorial dominion, to a ship on a voyage of discovery.

The President. — Yes and with passports.

Sir Charles Russell. — And a further exception if a ship is blown in by stress of weather. Now that is a serious and grave assertion of rights of sovereignty by Russia; and if after having been notified to foreign Powers, including Great Britain and the United States, they had acquiesced in it, and had made no objection to it, then possibly a case of estoppel or acquiescence by them might have been made out.

Senator Morgan. — Then, if I understand you, there seems to be no controversy between the parties here as to the fact that Russia asserted exclusive jurisdiction in Behring Sea.

Sir Charles Russell. — Undoubtedly, and then withdrew it.

Senator Morgan. — There is a question then as to the withdrawal?

Sir Charles Russell. — Certainly: our position is that they asserted it on paper, never exercised it, and then withdrew it. Mr Senator Morgan asked me whether he was to take it that both United States and Great Britain agreed that Russia asserted this territorial dominion in Behring Sea. I said, yes; I understood the other side also agreed in that.

Mr Carter. — No.

Sir Charles Russell. — I thought it was so.

Mr Carter. — What may be the effect of the Ukase is one thing, but what Russia intended by it is another. She did not intend in our view to assert exclusive jurisdiction; that is disavowed.

Sir Charles Russell. — At all events, I may repeat the remark which I just made — that Russia did assert territorial sovereignty, but that she asserted it only on paper; that she never exercised it; and, that, by the Treaty, she disclaimed it. That is the answer which I make to Senator Morgan. I may point out now that whereas we state the greatest distance between the islands at 190 miles, my friends put the distance at 205 miles.

Lord Hannen. — Is that the difference between the Pribilof Islands and the Aleutian Chain?

Sir Charles Russell. — No.

Lord Hannen. — I thought it was.

Sir Charles Russell. — It is between “Attu Island,” and the “Com-mander Islands”. At the same time I may point out that that does not make any difference, because they say at the beginning of their Case, that unless otherwise stated all measurements are given in English statute miles. The English statute mile is 1760 yards; but the Italian mile of the Ukase is the same as a geographical mile, which is about 2000 yards; so that practically there is no importance in the difference of measurements.

Lord Hannen. — At page 16 the United States Case speaks of the group of the Pribilof Islands. It says :

It is of volcanic origin and far removed from other land, the nearest adjacent points being Unalaska Island, at a distance of two hundred and fourteen miles to the southward .

That is the distance of the Pribilof Island group.

Sir Charles Russell. — That is quite right my Lord; that is another passage.

Lord Hannen. — It would be a curious coincidence if that should be stated to be 214 miles in both of the cases.

Sir Charles Russell. — The other is 205.

Lord Hannen. — Yes, I beg your pardon.

Sir Charles Russell. — The distance from Attu to the Commander Islands is stated to be 205 statute miles.

Lord Hannen. — As a matter of fact, I took some steps to ascertain the exact distance and I believe it is 175 miles from Attu Island to the Commander Islands.

Sir Richard Webster. — We put it at 195 miles, and they say it is 205. It is not a matter of any importance.

[Sir Richard Webster indicated the position on the map.]

Sir Charles Russell. — I have said, here is a broad and bold assertion of sovereignty by Russia. If Great Britain and the United States had acquiesced in that assertion, then there might have been possible grounds for putting forward a claim grounded upon acquiescence, or, as lawyers would call it, upon estoppel against the acquiescing or consenting Powers. How did they act? First of all, how did the United States Government act? I have referred you to page 132 of the correspondence, in Appendix to the United States Case, Volume I and Protest of United States. on that page is to be found Mr Quincy Adams's letter of the 25th of February, 1822, in which he says :

I am directed by the President of the United States to inform you that he has seen with surprise in this edict the assertion of a territorial claim on the part of Russia, extending to the 51st degree of north latitude on this continent, and a regulation interdicting to all commercial vessels other than Russian, upon the penalty of seizure and confiscation the approach upon the high seas within 100 Italian miles of the shores to which that claim is made to apply.

There is nothing more in that letter which I need read, except at the top of page 133, where you will find this sentence :

To exclude the vessels of our citizens from the shore beyond the ordinary distance to which the territorial jurisdiction extends has excited still greater surprise. This ordinance affects so deeply the rights of the United States. —

And so on. Now M. de Poletica does not shrink from the assertion of what his case is, and at page 133 of volume I of the Appendix to the Case of the United States is his letter in which he says boldly.

I shall be more succinct, Sir, in the exposition of the motives which determined the Imperial Government to prohibit foreign vessels from approaching the north west coast of America —

You will observe the use of this phrase :

belonging to Russia within the distance of at least 100 Italian miles. This measure, however severe it may at first appear, is after all but a measure of prevention. It is exclusively directed against the culpable enterprises of foreign adventurers who, not content with exercising, upon the coasts above mentioned, an illicit trade, very prejudicial to the rights reserved entirely to the Russian-American Company, take upon them besides to furnish arms and ammunition to the natives in the Russian possessions in America, exciting them likewise in every manner to resist and revolt against the authorities there established.

I pause for one moment. You will observe that he speaks there of “ the exposition of the motives ” which have prompted this. I want to point out that my learned friend, in treating of what was the effect of this legislation of Russia, has confounded motive with effect. It may well be that my friend is quite right in saying that the motive which the Russian Government had was to protect this trade and commerce, and these interests, on the coasts. That might have been its motive; but its legislation took the form of an assertion of territorial sovereignty to the extent which I have mentioned. Then M. de Poletica goes on to say :

The American Government doubtless recollects that the irregular conduct of these adventurers, the majority of whom was composed of American citizens, has been the object of the most pressing remonstrances on the part of Russia to the Federal Government from the time that diplomatic missions were organized between the two countries.

Then a little lower down he says :

Pacific means not having brought any alleviation to the just grievances of the Russian American Company against foreign navigators in the waters which environ their establishments on the north-west coast of America, the Imperial Government saw itself under the necessity of having recourse to the means of coercion, and of measuring the rigour according to the inveterate character of the evil to which it wished to put a stop.

He then proceeds :

I ought in the last place to request you to consider, Sir, that the Russian possessions in the Pacific Ocean extend on the North-west coast of America from Behring Sea to the 51st degree of north latitude, and on the opposite side of Asia, and the islands adjacent, from the same strait to the 45th degree.

The Tribunal will remember that in the Ukase of 1799 the claim was only made to the 55th degree.

Then M. de Poletica proceeds :

The extent of sea of which these possessions form the limits, comprehends all the conditions which are ordinarily attached to *shut seas* (*mers fermées*) and the Russian Government might consequently judge itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners. But it preferred only asserting its essential rights, without taking any advantage of localities.

That is he says in effect : — This is a shut sea : We are entitled to treat it as a shut sea : We are entitled to treat the whole expanse of Behring Sea as territory in the sense of excluding from that every

person whom we choose not to admit; but we limit our practical assertion to 100 Italian miles from the coast ”.

Now how is this met?

Mr Justice Harlan. — Does he mean to apply the phrase “ shut seas ” only to Behring Sea?

Sir Charles Russell. — I do not affirm that he does.

Mr Justice Harlan. — I thought you said Behring Sea just now. That was the reason I asked you.

Sir Charles Russell. — I think he extends it even more widely than to Behring Sea. That makes my position, of course a stronger one. I think you are right, Sir.

How does Mr Adams meet this? I turn to page 134, at the third paragraph, after stating the nature of the pretension he says :

This pretension is to be considered not only with reference to the question of territorial right, but also to that prohibition to the vessels of other nations, including those of the United States, to approach within 100 Italian miles of the coasts. From the period of the existence of the United States as an independent nation, their vessels have freely navigated those seas, and the right to navigate them is a part of that independence.

With regard to the suggestion that the Russian Government might have justified the exercise of sovereignty over the Pacific Ocean as a close sea, because it claims territory both on its American and Asiatic shores, it may suffice to say that the distance from shore to shore on this sea, in latitude 51° north, is not less than 90° of longitude, or 4,000 miles.

There, no doubt, Mr Adams was speaking of a wider expanse of the ocean.

As little can the United States accede to the justice of the reason assigned for the prohibition above mentioned. The right of the citizens of the United States to hold commerce with the aboriginal natives of the northwest coast of America—

I beg attention to this adoption of this phrase “ northwest coast ”.

We have seen how the phrase was used by M. de Poletica. Mr Adams is adopting it, and he says :

The right of the citizens of the United States to hold commerce with the aboriginal natives of the Northwest Coast of America without the territorial jurisdiction of other nations—

That means outside the territorial jurisdiction—

even in arms and munitions of war, is as clear and indisputable as that of navigating the seas, etc.

That right has never been exercised in a spirit unfriendly to Russia, etc.

On the next page, M. de Poletica replies :

In the same manner the great extent of the Pacific Ocean at the fifty-first degree of latitude can not invalidate the right which Russia may have of considering that part of the ocean as close. But as the Imperial Government has not thought fit to take advantage of that right, all further discussion on this subject would be idle.

Then I do not think I need trouble you with that. But after that comes a very important communication from Mr Middleton, who was the Minister

of the United States at St. Petersburg, to Mr Adams, Secretary of State at Washington ; and it will be seen that once this bold assertion on the part of Russia was met face to face, the operation — if I may use it in relation to a great Power of whom I desire to speak with all possible respect — the operation known as “ climbing down ” began, as you will see, from this very letter. He says on page 136 :

To Mr Speransky, Governor General of Siberia, who had been one of the committee originating this measure, I stated my objections at length. He informed me that the first intention had been (as Mr Poletica afterwards wrote you) to declare the northern portion of the Pacific Ocean as *mare clausum*—

I ask my friends, can there be any doubt what the “ northern portion of the Pacific Ocean ” there meant, can there be any doubt that it included Behring Sea? —

but that idea being abandoned, probably on account of its extravagance, they determined to adopt the more moderate measure of establishing limits to the maritime jurisdiction on their coasts, such as should secure to the Russian American Fur Company the monopoly of the very lucrative traffic they carry on. In order to do this they sought a precedent, and found the distance of 30 leagues, named in treaty of Utrecht, and which may be calculated at about 100 Italian miles, sufficient for all purposes.

I need not say that what was once done by Treaty is no justification for what has been done without Treaty.

I replied ironically that a still better precedent might have been pointed out to them in the papal bull, of 1493, which established as a line of demarcation between the Spaniards and Portuguese a meridian to be drawn at the distance of 100 miles west of the Azores. and that the expression “ Italian miles ” used in the ukase very naturally might lead to the conclusion that this was actually the precedent looked to. He took my remarks in good part, and I am disposed to think that this conversation led him to make reflections which did not tend to confirm his first impressions, for I found him afterwards at different times speaking confidentially upon the subject.

For some time past I began to perceive that the provisions of the ukase would not be persisted in. It appears to have been signed by the Emperor without sufficient examination, and may be fairly considered as having been surreptitiously obtained. There can be little doubt, therefore, that with a little patience and management it will be molded into a less objectionable shape. But in this, as in other matters, the *revocare gradum* is most difficult. Since the receipt of your dispatch No 12, I have had several conferences with the secretaries of state, and we have discussed fully and freely *the state of the question* as left by Mr. Poletica with your letter unanswered in his pocket.

I informed him that I intended to ask a formal interview with Count Nesselrode before his departure, for the purpose of taking up this subject and urging some decision upon it, as I never had been able to ascertain officially whether the offensive provisions of the ukase would be revoked. I felt the more anxious, too, because I had learned that a Russian Frigate was shortly to sail for the N. W. Coast. I informed him further that I had prepared a *note verbale* to leave with Count Nesselrode, which I begged to be permitted to read to him (Count Capodistrias), as I was well assured of his anxious desire that all things should go on smoothly between us. (See paper No 1.)

After hearing this paper with attention he said to me : “ Puisque vous me faites l'honneur de me consulter, je vous dirai franchement mon avis. Si vous voulez que la chose s'arrange, ne donnez point votre note — L'Empereur a déjà eu le bon es-

prit de voir que cette affaire ne devrait pas être poussée plus loin. Nous sommes disposés à ne pas y donner de suite. Les ordres pour nos vaisseaux de guerre seront bornés à empêcher la contrebande dans les limites reconnues par les autres puissances, en prenant nos établissements actuels pour base de ces opérations. De cette manière, il n'y aura pas de complication pour entraver la négociation que pourra entamer M. le Baron de Tuyl dès son arrivée à Washington. Si vous dites que vous faites protestation, vous ferez du tort à la négociation; il ne faut pas non plus faire l'insinuation que nous ayons avancé une injuste prétention, même en nous complimentant sur notre politique passée; il ne faut pas nous sommer de révoquer des ordres donnés; nous ne révoquons pas; nous ne rétractons pas. Mais dans le fait il n'y a pas d'ordres donnés qui autorisent ce que vous craignez ”.

Therefore, even at that stage, in 1822, the year after the Ukase was promulgated, and when the matter is being discussed between politicians, we find the Emperor's representatives saying that the jurisdiction will not be exercised.

Then the letter goes on :

At that conference I talked over the matter with the two secretaries of state, and brought fully to their view the substance of the instructions upon the ukase of 4th September last, insisting upon the necessity of this Government suspending the execution of those regulations, which violate the general right of navigating within the common jurisdiction of all nations, and declaring that the territorial pretension advanced by Russia must be considered as entirely inadmissible by the United States.—

Then follows the *note verbale*, which I need not trouble you with, because the effect of it has already been disclosed in that discussion.

We may now proceed further. On page 141 is an important despatch from Mr. Adams to Mr. Middleton of the 22nd of July 1823 ?

Washington, July 22, 1823.

SIR : I have the honor of inclosing herewith copies of a note from Baron de Tuyl, the Russian minister, recently arrived, proposing, on the part of His Majesty the Emperor of Russia, that a power should be transmitted to you to enter upon a negotiation with the ministers of his Government concerning the differences which have arisen from the Imperial ukase of 4th (16th) September, 1821, relative to the northwest coast of America, and of the answer from this Department acceding to this proposal. A full power is accordingly inclosed, and you will consider this letter as communicating to you the President's instructions for the conduct of the negotiation.

From the tenor of the ukase, the pretensions of the Imperial Government extend to an exclusive territorial jurisdiction from the forty-fifth degree of north latitude, on the Asiatic coast, to the latitude of fifty-one north on the western coast of the American continent.—

You see that is describing the circle I have mentioned —

and they assume the right of interdicting the navigation and the fishery of all other nations to the extent of 100 miles from the whole of that coast.

The United States can admit no part of these claims.

I pause simply to put one question. Can any document be referred to in which the United States ever receded from that position? There is the distinct statement of the Secretary of State to the Minister at St. Petersburg —

The United States can admit no part of these claims.

Their right of navigation and of fishing is perfect, and has been in constant exercise from the earliest times, after the peace of 1783, throughout the whole extent of the Southern Ocean, subject only to the ordinary exceptions and exclusions of the territorial jurisdictions, which, so far as Russian rights are confined to certain islands north of the fifty-fifth degree of latitude, and have no existence on the continent of America.

The correspondence between Mr. Poletica and this Department contained no discussion of the principles or of the facts upon which he attempted the justification of the Imperial ukase. This was purposely avoided on our part, under the expectation that the Imperial Government could not fail, upon a review of the measure, to revoke it altogether. It did, however, excite much public animadversion in this country, as the ukase itself had already done in England. I inclose herewith the North American Review for October, 1822, No. 37, which contains an article (p. 370) written by a person fully master of the subject; and for the view of it taken in England I refer you to the fifty-second number of the Quarterly Review, the article upon Lieutenant Kotzebue's voyages. From the article in the North American Review it will be seen that the rights of discovery, of occupancy, and of untested possession, alleged by Mr. Poletica, are all without foundation in fact.

I have next to call your attention to page 142, on which will be found an able argument by Mr Adams directed mainly to the question of the territorial limits claimed as regards the Southern boundary, etc.

Next follows a justification of the traffic that was carried on by United States citizens : a defence of that traffic as not being clandestine, etc.

Then, on page 143, the last paragraph but two, after referring to the statement that the traffic was unlawful and irregular Mr Adams continues :

It is necessary now to say that this impression was erroneous ; that the traffic of the citizens of the United States with the natives of the north-west coast was neither *clandestine*, nor unlawful, nor irregular; that it had been enjoyed many years before the Russian American Company existed, and that it interfered with no lawful right or claim of Russia.

This trade has been shared also by the English, French, and Portuguese. In the prosecution of it the English settlement of Nootka Sound was made, which occasioned the differences between Great Britain and Spain.—

Of course it is quite right to say that that trade was mainly a trade to the south of the Aleutian Chain, and in that great bight south of the Aleutian Chain.

Then he proceeds, at the top of page 144, to justify the claim of the United States from the 42nd to the 49th parallel of latitude on the Pacific Ocean. I do not think it is important that I should trouble you with that. But enclosed in that letter was a suggestion for an agreement that would meet the difficulty :

ARTICLE I.

In order to strengthen the bonds of friendship and to preserve in future a perfect harmony and good understanding between the contracting parties, it is agreed that their respective citizens and subjects shall not be disturbed or molested, either in navigating or in carrying on their fisheries in the Pacific Ocean or in the South Seas, or in landing on the coast of those seas, in places not already occupied, for the purpose of carrying on their commerce with the natives of the country; subject, nevertheless to the restrictions and provisions specified in the two following articles.

ART. II.

To the den that the navigation and fishery of the citizens and subjects of the contracting parties, respectively, in the Pacific Ocean or in the South Seas, may not be made a pretext for illicit trade with their respective settlements, it is agreed that the citizens of the United States shall not land on any part of the coast actually occupied by Russian settlements, unless by permission of the governor or commander thereof, and that Russian subjects shall, in like manner, be interdicted from landing without permission at any settlement of the United States on the said northwest coast.

ART. III.

It is agreed that no settlement shall be made hereafter on the northwest coast of America by citizens of the United States or under their authority, north, nor by Russian subjects, or under the authority of Russia, south of the fifty-fifth degree of north latitude.

Is it not absurd — I am not putting it too strongly — to suggest even that the Behring Sea was excluded from that : that when we speak of the “ Northwest Coast ”, which has been again and again referred to, which is used in the original Ukase, which is used in the Charter, which is used in the correspondence without limitation, to say that that northwest coast, forsooth, is a bit of the coast south of the Aleutian Chain, and stops there? Of course one may take too sanguine a view of these matters, but I do submit that that narrower contention is absurd, and quite inconsistent with the tenor of these documents and this correspondence.

Mr Justice Harlan. — Sir Charles, what effect on that view would the words near the top of page 144 have, in the letter which enclosed the memorandum, which are : “The right of the United States from the forty-second to the forty-ninth parallel of latitude on the Pacific Ocean we consider as unquestionable”? Was not that strip of land in the mind of Mr Adams?

Sir Charles Russell. — I do not myself see, Sir, that in this connection it would have any effect at all.

Sir Richard Webster. — The area from latitude 42° to 49°, is that enclosed piece (indicating it on the map).

Mr Justice Harlan. — He was contending that the United States had the right unquestionably to go to 49°?

Sir Charles Russell. — Yes.

Mr Justice Harlan. — When he submitted along with that letter this draft of a Treaty; the question I was directing the attention of counsel to was whether, when speaking of the Northwest Coast of America, he is not referring to the part which the United States claimed.

Sir Charles Russell. — No Sir. Why should he be referring to that? He is stating, so far as that part is concerned, what is the territorial limit of the coast claimed by the United States. So far as the United States were concerned, as between them and Great Britain, the northern boundary of their possessions on that northwest coast had not been fixed.

You, of course, Sir, are aware of that. It was a matter in dispute how far, in succession to the rights of Spain, the American title went along that northwest coast. That was a bit of the northwest coast, I admit. All that coast right up to the Behring Straits is a part of the northwest coast of the continent of America; but there is no limitation; and that meaning I think is made clear by the Article 2. It is in effect saying, « So far as there are Russian possessions, the Americans shall not land where there are establishments; and so far as there are American possessions on that northwest coast, Russians shall not land where there are American establishments.” That is what the effect of it is, evidently.

Mr Justice Harlan. — Do you remember what the evidence says — I have forgotten — upon the question as to what country had possessions on the eastern shore of Behring Sea at that time in what is now Alaska?

Sir Charles Russell. — Undoubtedly, only some Russian settlements.

Lord Hannen. — Only one Russian settlement, where there were three men and four women, or something of that kind.

Sir Charles Russell. — Yes.

Mr Justice Harlan. — There were no settlements, then, practically, by any country on that shore?

Sir Charles Russell. — No.

Senator Morgan. — How many settlements on the Siberian coast were there at that time?

Sir Charles Russell. — We have no evidence, of course, as to that. Siberia, as I pointed out the other day, stood in a different position to Russia from Alaska. Siberia was part of the realm of Russia. The persons who were there were Russians. There may have been an aboriginal population there, so far as I know. I do not know. So far as Alaska was concerned, it was treated as a colony of Russia.

The Tribunal here adjourned for a short while.

Sir Charles Russell. — In reference to the question of Russian settlements north of the Aleutians, I would refer the Tribunal to page 42 of vol. I of the Appendix to the British Case. I do not think it is necessary to trouble the Tribunal now to do more than take a note of it. I simply make this observation. It will be there found that the only Russian settlement north of the Aleutian chain was at a place called Nushagak. The population was not considerable. There were three Russian males and two Russian females. Nushagak is in Bristol Bay, which is an indentation in the coast-line north of the Aleutian peninsula. That is where the only settlement was.

THE UNITED STATES TREATY OF 1824.

I Now proceed with the correspondence, which is rapidly drawing to a close. I pointed out the suggestion made by Mr Quincy Adams in that

important despatch of the 22nd July 1823, and I may pass over the intervening correspondence and come to the question of the Treaty itself. The Treaty itself, Mr President, will be found on page 35 of the same Volume with which I have been dealing. I do not stop to do more than to recall the broad assertion of sovereign jurisdiction made by Russia in the Ukase of 1821, and in the Charter of 1821, and now side by side with that we have the Treaty :

It is agreed that in any part of the great Ocean commonly called the Pacific Ocean or South Sea, the respective citizens or subjects of the high contracting powers shall be neither disturbed nor restrained, either in navigation or in fishing or in the power of resorting to the coasts upon points which may not already have been occupied for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following articles.

I do no more than ask this question. Is it possible, in view of the assertions made by Russia, in view of the statements of Mr Quincy Adams that no part of that claim can be admitted by the United States, in view of the fact that from that position the United States never departed, to contend that from this Treaty is to be excluded the whole of Behring Sea and the coasts of the territory abutting upon Behring Sea? We submit with all deference that that is an impossible and absurd contention.

ARTICLE II. With a view of preventing the rights of navigation and of fishing exercised upon the Great Ocean by the citizens and subjects of the high contracting Powers from becoming the pretext for an illicit trade, it is agreed that the citizens of the United States shall not resort to any point where there is a Russian establishment, without the permission of the governor or commander; and that, reciprocally, the subjects of Russia shall not resort without permission, to any establishment of the United States upon the Northwest coast.

ARTICLE III. It is moreover agreed that, hereafter, there shall not be formed by the citizens of the United States, or under the authority of the said States, any establishment upon the northwest coast of America, nor in any of the islands adjacent, to the north of 54 degrees and 40 minutes of north latitude; and that in the same manner there shall be none formed by Russian subjects, or under the authority of Russia south of the same parallel.

Can it be suggested that that was restricted; and that when the phrase "Northwest coast" is mentioned there, it did not mean that no establishment along any part of that northwest coast should be made north of 54°40'; and, in the same way as regards American territory, none should be made by Russian subjects south of that point?

Then comes Article IV :

It is, nevertheless, understood that during a term of ten years, counting from the signature of the present Convention, the ships of both Powers, or which belong to their citizens or subjects respectively, may reciprocally frequent, without any hindrance whatever, the interior seas —

we are dealing here with territorial waters, entrance to which is limited to the ten years —

gulfs, harbours, and creeks, upon the coast mentioned in the preceding article, for the purpose of fishing and trading with the natives of the country.

What is the ground for restricting that to a portion only of this north-west coast?

Article III has dealt with the formation of establishments, and has said that one Power shall not form a fresh establishment north of a particular point in Russian territory, and that the other Power shall not form a fresh establishment south of a particular point on the United States territory. And then Article IV, passing away from the subject of establishments, deals with the question of fishing and trading with the natives of the country, and provides that there shall be a reciprocal right : to the citizens of the United States along the whole coast which belongs to Russia, and reciprocally there shall be the right of the Russian people along the whole coast which belongs to the United States.

The President. — Is there evidence that the United States took advantage of this article to trade with the natives of the coast?

Sir Charles Russell. — Yes.

The President. — Inside Behring Sea?

Sir Charles Russell. — No, apparently at that time there was no inducement to go inside Behring Sea.

Senator Morgan. — I suppose the fur-seals were in there then, were they not?

Sir Charles Russell. — Yes, fur-seals were in Behring Sea, I presume, from time immemorial. I do not know, but they probably were, so far as we know. Up to this time the fur-seals had not assumed any position of importance, either as regards Russian enterprise or the enterprise of any other people.

General Foster. — They had taken over 3,000,000 of skins.

Sir Charles Russell. — I will deal with that in a moment. The observation is a little irregular, and I must ask you to restrain your impatience. Mr Foster has made an interjection, Sir, which it is perhaps irregular to notice, in which he says that there were a large number of skins got. I do not know the evidence he refers to, but I have no difficulty in saying that, as regards the fur-seals on the Pribilof Islands, they had not assumed any importance as regards the supply of skins. The islands were discovered in 1786, I think, and in Japan and on the Commander Islands we know there was trading, but I do not recollect that there was any such extent of dealing with fur-seals on the Pribilof Islands. I will not refer to the interruption further, but if my learned friends will give me the reference, I will deal with it at a later stage. As a matter of fact, it stands thus. There were no settlements at the time of this Treaty north of the Aleutians, except the one I have mentioned at Nushagak. Obviously, therefore there would be very little interest — motive of interest is perhaps the best way of putting it — to go trading in the Behring Sea; but the point is not, with very great deference, whether the United States used the power — they did at a later period use it for whaling and to a considerable extent in Behring Sea after this; the question of the President was addressed only to dealings with natives.

The President. — Yes, under Article IV.

Sir Charles Russell. — Yes : there was, in fact, as I have said, only one settlement, and there would be comparatively little interest or motive to attempt such trading at that time; but as regards the free navigation of Behring Sea for the purposes of whaling, which was then considered a profitable industry, the United States did undoubtedly pursue that industry in the Behring Sea.

The difficulty that my learned friends have to meet is this. Article III specifies the northwest coast of America to the north of $54^{\circ} 40'$, which is the southern limit of Russian possessions, and extends without any limitation whatever to the north; and when Article IV is framed it refers to the coast mentioned in the preceding Article without any limitation. Therefore in the later article (to the limit and extent of the northwest coast in the preceding article) it obviously extends to the whole of the north-west coast right up to the Behring Straits. I think that is all I have to say upon the subject of the Treaty : except to read, from page 30, Volume I of the Appendix to the British Counter-Case, a passage in a communication made by Count Nesselrode in a letter dated the 11th of April, 1824, only six days after the date of the Treaty. It is a considerable communication, and I may tell the Tribunal that this was written apparently with the object of allaying the apprehensions and toning down the objections of the Commercial Company, as to the view that they should take of the effect of this Treaty of 1824 upon their interests. The revised translation is in the right hand column.

In Article III — that is of this Treaty — the United States recognize the sovereign power of Russia over the western coast of America, from the Polar Seas to $54^{\circ} 40'$ of north latitude; while we on our part promise not to found Settlements below this parallel, as a matter of course only in those places, and without extending this provision to the Colony of Ross, far distant to the south.

Then at the bottom of the page :

In Article IV we allow the American States, though for no longer than ten years, to trade and fish in places within our dominions.

There it is stated without any qualification whatever; and this is written, as I say, six days after the Treaty; it extends without any qualification the whole way up; and the importance of Article IV is that it gives a temporary advantage to the United States — that is to say, it gives to United States subjects rights of access to interior seas, to gulfs, to harbours, and to creeks, all of which, or the greater part of which, would be in strictly territorial waters; and, therefore, to which, upon the general rule of international law, the United States would not have any right of access at all.

The President. — Was this diplomatically communicated to other Powers? Did it come from the United States Minister, or where is it taken from?

Sir Charles Russell. — The explanation is given on page 28. It is a letter from Count Nesselrode to Nicholas Semenovitch, and I gather

from the communication that this gentleman was interested in the American Commercial Company, and that it was written with a view of allaying the apprehension of, or justifying the Treaty to, that gentleman : that is the object of it.

The President. — You are not aware how the British Government came into possession of that document.

Sir Charles Russell. — Not at the moment.

The President. — It is not of much importance, but I should to know if it had any international value.

Sir Richard Webster. — I think it is one of the documents which came to light when the annexation to the United States took place. This is the correct translation by the United States of that document.

The President. — The purport of my question was, whether the United States were officially apprised of the existence of this document and of this interpretation. That is the point of my question.

Sir Charles Russell. — I am not able to say that they had it officially.

The President. — At all events they had the document in their hands.

Sir Charles Russell. — Yes, they had the document in their hands.

Senator Morgan. — Those documents came over to the United States, I take it, to be deposited among the archives with reference to the Alaskan regions.

Sir Charles Russell. — I should judge the case to be this : that when the cession of 1867 was effected all the documents that related to the Alaskan territory were handed over as being necessary for the archives ; and I should say that that was the probable explanation.

The President. — Yes.

Sir Charles Russell. — Now let me make one other comment before I pass from this Treaty

The Tribunal will observe that neither in the Ukase, nor in the Charter under the Ukase, is any special reference made to any particular kind of fishing beyond the statement as to *whaling*, which word is used in Section 4 of the Ukase : “ pursuits of commerce, whaling and fishery and of all other industry in all islands ”, and so forth. There is no indication therefore of any special kind of fishing.

There is nothing for instance about sea-otters or fur-seals, nor any other kind of animal or any special kind of fish. The only one is whaling, which I presume was a matter of more or less importance. And therefore, when in Article 4 of the Treaty it is said in express terms that the subjects of neither Contracting Party shall be disturbed or restrained in navigation or in fishing or in resorting to the coast, and so on, I need not say that that is a recognition of the mutual rights as to fishing, without any limitation of any kind or character either as to the mode of fishing or the objects to which that fishing is addressed. It is absolute and unqualified.

Now one other word : A distinction of course is to be drawn between different parts of this Treaty. The United States will not say, they have

not said, they cannot correctly say, that Article 1 *gave* them a right. That is not the position so far as the general rights of navigation and fishing in the open sea are concerned

The Treaty of 1824 did not confer that right on the United States. It recognized a right. The position of the United States in the language of Mr Quincy Adams was this : — We can admit *no part* of the claim of Russia, and therefore the true position is this, that Article 1 of the Treaty of 1824, just as in the Treaty of 1825, at which I have not yet arrived, does not *confer* the right, but is merely the *recognition* of the right; and therefore withdraws all the pretensions inconsistent with that right which were advanced in the Ukase and by the Charter.

When we come to Article IV, the case is different; because as regards Article IV something is given which is not a right, apart from Treaty, either of the United States on the one hand or of Russia on the other, because it gives the right of frequenting the interior seas, gulfs, harbours, and creeks on the coasts mentioned, all those pointing to territorial waters which neither Russia nor America could frequent in the territories of the other as of right.

Now, I leave that Treaty altogether, with one small exception, namely the argument which my learned friend, Mr Carter, greatly to my surprise, based upon the conversation between Baron de Tuyll and Mr Adams on the eve of the signature of the Treaty. I The Baron de Tuyll incident. say which my learned friend advanced greatly to my surprise; I suppose he advanced it because it had already been advanced in the argument of Mr Blaine in one of his letters; but my surprise at my learned friend advancing it is because, when looked at, it is the strongest confirmation of the construction of the Treaty of 1824 on which we are insisting. What had happened? The Trading Company was, apparently, alarmed that there might be some restriction of those rights, as indeed there were. The Company was composed of influential persons. It had construed the Treaty in the sense in which we are construing it, and they wanted to see whether, before it was actually signed, there might not be something which, as regards the effect upon them and their rights under the Charter, might not be mitigated. Accordingly, we have that very interesting record at page 263 of Volume I of the Appendix to the United States Case, the passage in question being at page 276. This is the long letter of the 17th of December, 1890, from Mr Blaine to Sir Julian Pauncefote.

Baron Tuyll, the Russian Minister, wrote me a note yesterday requesting an immediate interview, in consequence of instructions received yesterday from his Court. He came, and after intimating that he was under some embarrassment, [very naturally] in executing his instructions, said that the Russian-American Company, upon learning the purport of the Northwest Coast Convention concluded last June by Mr Middleton, were extremely dissatisfied (*a jeté de hauts cris*), and, by means of their influence, had prevailed upon his Government to send him these instructions upon two points. One was that he should deliver, upon the exchange of the ratifications of the Convention, an explanatory note purporting that the Rus-

sian Government did not understand that the Convention would give liberty to the citizens of the United States to trade [where?] on the coast of Siberia and the Aleutian Islands. The other was to propose a modification of the Convention, by which our vessels should be prohibited from trading on the northwest coast north of latitude 57°.

You observe, therefore, that he was to explain the Russian meaning as to the liberty of the citizens of the United States to trade on the coast of Siberia and the Aleutian Islands. What was the other point?

To propose a modification of the Convention, by which our vessels should be prohibited from trading on the northwest coast North of latitude 57° [you see, a modification.] With regard to the former of these points he left with me a minute in writing.

With this preliminary statement, Baron Tuyl, in accordance with instructions from his Government, submitted to Mr Adams the following note :

Explanatory Note from Russia.

Explanatory note to be presented to the Government of the United States at the time of the exchange of ratifications, with a view to removing with more certainty all occasions for future discussions ; by means of which note it will be seen that *the Aleutian Islands, the coasts of Siberia, and the Russian Possessions in general on the Northwest Coast of America to 59°30' of north latitude* are positively excepted from the liberty of hunting, fishing, and commerce stipulated in favour of citizens of the United States for ten years.

Therefore, you observe that Baron de Tuyl and his friends, the American Company behind him, read the Treaty as we have been contending that Treaty can only be read, as giving the liberty of visit for ten years to the whole of the northwest coast ; and this is his argument. He says :

This seems to be only a natural consequence of the stipulations agreed upon, for *the coasts of Siberia* are washed by the Sea of Okhotsk, the Sea of Kamschatka, and the Icy Sea, *and not by the South Sea* mentioned in the first article of the Convention of April 5-17 (1824). *The Aleutian Islands* are also washed by the Sea of Kamschatka, or Northern Ocean.

It is not the intention of Russia to impede the free navigation of the Pacific Ocean. She would be satisfied with causing to be recognized, as well understood and placed beyond all manner of doubt —

My learned friend did not read this; probably he accidentally overlooked it —

the principle that beyond 59° 30' no foreign vessel can approach her coasts and her islands, nor fish nor hunt within the distance of two marine leagues.

My learned friend did not read that passage.

Mr Carter. — I think I did.

Sir Charles Russell. — No, I think not ; indeed, I am sure not, because I noted it at the time. The assertion amounts to this :—

The interpretation we put upon it is the interpretation the Commercial Company have been putting upon it, and we propose this alteration ; not to insist on the 100 miles, but we shall be content with two marine leagues, that is to say, keep outside the territorial waters, only let us extend the territorial waters not to one but to two marine leagues.

Senator Morgan. — That is the first time I think I have heard in any paper of the distinction drawn between fishing and hunting, that is, two marine leagues from land; what could they hunt two marine leagues from land?

Sir Charles Russell. — I suppose, though I do not defend the accuracy of the language of Baron Tuyl — I suppose that you might say, not improperly, that you hunted a whale, that you hunted a sea-otter, or that you hunted a fur-seal.

Senator Morgan. — I mean, you would not say that you hunted for halibut or codfish.

Sir Charles Russell. — No; I should say you fish for them, but you, sir, are quite as good a judge of language in that respect as I or anybody else.

Senator Morgan. — I mean, it is a point on the construction of the Treaty, that there was a distinction made between hunting and fishing, and that the right reserved by Russia, or rather, the United States, of whaling and other fisheries did not include perhaps the right to hunt seals, or to hunt sea-otters.

Sir Charles Russell. — My respectful answer to that would be, Sir, Where is there a trace of such a reservation?

Senator Morgan. — I mean, if there is such a thing.

Sir Charles Russell. — There is nothing. Let me call the attention of the learned Arbitrator to the fact that in the Ukase or in the Charter under the Ukase, which refers to any special kind of fishing or of hunting, the expression is: "The pursuits of commerce, whaling, and fishery, and of all other industry", and so on, — that is what is asserted. I would submit this point to the learned Senator: if the Company were to get the right of hunting fur-seals exclusively within 100 miles of the coast, it was to get it under this Ukase, or under the Charter, or not at all. Under the Charter it enjoys the privilege of hunting and fishing to the exclusion of all other Russian or foreign subjects throughout the territories long since in the possession of Russia.

Senator Morgan. — Will you allow me for one moment? They have the privilege of hunting and fishing mentioned; but the question is whether they gave up in the Treaty of 1824 and of 1825 the right of hunting and fishing, or only the fishing?

Sir Charles Russell. — With great deference, I think the fallacy, if I may say so, is that the word is primarily applied to the hunting of animals on land, and the Company, under this Charter, had great privileges, admittedly within the power of the Russian Emperor to grant, of hunting on that land and over large tracts of land. That is not touched, and the Treaty is silent upon any question of grant of Russian territory, because nobody can affect or control or limit the disposition of the Russian Government, or Legislature if there be one, as regards all within the territorial sovereignty; but, when you come to the question of the sea, the Treaty says the subjects of both the Powers shall have un-

restricted rights of fishing in the South Sea, without any restriction or limitation, and, though I listen with the greatest deference to any suggestion coming from the Arbitrators, I fail to see what the difficulty is that really presses on the learned Senator's mind. We never contended that that Treaty gave the right of fishing in the open sea; we never contended that it conferred a right, but merely, by the recognition of the right, withdrew an unjust pretension which would have limited the right of the public to fish in the Sea.

It is clear that Baron Tuyl's objection went only to the extent of a limitation of the right of hunting and fishing within the distance of two marine leagues; and the use of the word " hunting " in that connexion clearly shows that he, at all events, was using " hunting " in a sense applicable to the sea, because " within two marine leagues of the shore " could of course, only be upon the sea; and all he was saying was: " You must not come and hunt or fish " — whatever the right phrase may be — " within two marine leagues ". But that was not quite all. Mr Adams, as one would expect from a statesman of his known ability, said " You need not be uneasy " — (and I think that answers the question which the learned President was good enough to put a minute or two ago) — " If you talk of these northern regions, you will be drawing the attention of our people to it. There is no great interest for them to go at present — it is not worth while making a point of it. But he says: " The Senate will agree to this Treaty. We have no power to depart from the Treaty. The Treaty must speak according to its natural effect, and therefore, to put it plainly and tersely, you must take it or leave it ".

The Russian Government was anxious to take it, because they were then securing for the first time a recognition on the part of Great Britain and the United States of a distinct territorial sovereignty over a previously disputed territory, and therefore the Treaty passed, and is to be interpreted according to its meaning and the natural import of the words which are used in the Treaty itself.

I say therefore that so far from that Baron de Tuyl incident furnishing an argument against our contention, it is a circumstance most strongly significant of the fact that the American Company were taking the very view of the construction of the Treaty of 1824 which is the construction which we are now saying is the clear and indubitable one.

THE BRITISH TREATY OF 1825

I pass now to the Treaty of 1825, and with regard to that Treaty I must begin by observing that if I have made my ground good as regards the Treaty of 1824, I stand in a position certainly as strong, probably stronger, when I come to consider the Treaty of 1825; because from beginning to end of the correspondence it will be found that that part of the assertion of Russia to which Great Britain most strongly objected

was the right of affecting and controlling free navigation and free rights in the open sea; and as will appear in the correspondence to which I will now call attention, the Government of Great Britain was not concerned about pressing the question of delimitation of territory upon the coast nearly so much as in pressing a settlement of the pretensions as regards maritime jurisdiction.

I ought indeed to have said in connection with the other subject, particularly the meaning of the north-west coast, that the position of America in this regard was a little singular. The boundaries, as I said, between Russian territory on the coast and British territory, and United States territory, were to a large extent undefined. It was pretty clear — I do not think the United States ever suggested the contrary — that to some extent, at least, there would come in as a wedge between Russian territory on the north and United States territory on the south, some portion of British territory on the coast. The exact point was not defined or limited.

As I have said, the limit of the Russian claim to the south had been variously advanced by Russia. In the Ukase of 1799, they had only claimed to go down to 55°. In the Ukase of 1821, they had claimed to go down to 51°. The Arbitrators will recollect that. On the other hand, the exact point north to which the United States were prepared to press its just claims to territory had been left more or less undefined, and it was a matter of only indirect interest to the United States of what was to be the southern boundary of the Russian possessions. The more they could squeeze the Russian assertions of sovereignty on the coast further north, the greater chance it would give them of squeezing British territory further north, and so extend their own claims. It was only in that sense a matter of comparative importance to the United States what should be the southern boundary of the Russian possessions.

Now the correspondence, so far as Great Britain is concerned, is most conveniently set out in the 2nd volume of the Appendix to the British Case, and it is all collected there as far as I desire to use it. It begins with a letter from Baron Nicolay to the Marquess of Londonderry. This is a long letter and I do not think it is necessary I should trouble you by reading it in full. The fourth sentence begins :

Le nouveau règlement n'interdit point aux bâtimens étrangers la navigation dans les mers qui baignent les possessions Russes sur les côtes nord-ouest de l'Amérique et nord-est de l'Asie.

I merely read that to shew the extent to which it extends. Then it goes on :

D'un autre côté, en considérant les possessions Russes qui s'étendent, tant sur la côte nord-ouest de l'Amérique depuis le détroit de Behring jusqu'au 51° de latitude septentrionale _____

It then proceeds to give the boundaries very much as in the correspondence of M. de Poletica with the United States which I have already

read. He then goes on to claim that it would entitle Russia to treat the sea as a closed sea and then he finally says.

Il s'est borné, au contraire, comme on a lieu de s'en convaincre par le règlement nouvellement publié, à défendre à tout bâtiment étranger, non seulement d'aborder dans les établissements de la Compagnie Américaine, comme dans la presqu'île du Kamtchatka et les côtes de la mer d'Okhotsk, mais aussi de naviguer le long de ces possessions et en général d'en approcher à une distance de 100 milles d'Italie.

On the top of the next page occurs another sentence which shews his apprehension of the meaning of the Pacific Ocean.

Car, s'il est démontré que le Gouvernement Impérial eût eu à la rigueur la faculté de fermer entièrement aux étrangers cette partie de l'Océan Pacifique qui bordent nos possessions en Amérique et en Asie.———

unmistakeably referring to Behring Sea as part of the Pacific Ocean.

Now the Government of the King immediately took advice upon the matter, and Mr Christopher Robinson, the then King's Advocate, was asked to express his opinion :

In obedience to your Lordship's directions I have the honour to report that it appears to be the object of this communication to obtain indirectly from his Majesty's Government an acknowledgment of territorial rights which are assumed by Russia over a portion of sea that may become of great importance with reference to the trade of that part of the world, and the discoveries which are now directed to that quarter.

It is important to observe that he, a lawyer, at once sees that the assertion of the claim to exclude others from a definite area of the sea from the coasts, is an assertion of territorial sovereignty, and accordingly he, at once, so describes it. You will see he says on page 2 of the volume II of the Appendix to the Case of the British Government :

The communication indirectly asserts an exclusive right in the sovereignty « d'une mer fermée sur l'espace de mer, dont les possessions » (from Behring's Straits to 51° north, on the west coast of America, and 45° north on the coast of Asia) “ forment les limites ”, and it proceeds to announce as a qualified exercise of that right the exclusion of all foreign ships, under pain of confiscation, from approaching within 100 miles of those coasts.

The extent of territory so assumed is much greater than is ordinarily recognized by the principles of the law of nations.

and so on.

Now the letter from Count Nesselrode to Count Lieven, on the next page, is practically the same. I think in every important respect it is the same as Baron de Nicolay's letter which I have already read, and therefore I forbear to trouble the Tribunal with it. Sir Charles Bagot was, at this time, the British Minister at St. Petersburg, and he writes a letter on the 17th of November, beginning on the bottom of page 4, referring to his despatch in which he transmitted the heads of the Ukase. I will not trouble the Tribunal with reading the whole of the letter, but the last passage but one is important :

When I found that the Ukase had been already communicated to your Lordship I abstained from entering with Count Nesselrode into any further discussion of it.

or inquiring of him, upon what grounds the 51st degree of north latitude (which, after the last Treaty between Spain and the United States, reduces the possessions of Great Britain to two degrees of latitude) had been now declared,—

that is to say, Great Britain was being squeezed between those two claims.

I believe for the first time, to be the boundary of the Russian dominion upon those coasts, but I have adverted to the novel principle involved in that Regulation of the Decree which dooms to confiscation all foreign vessels which may approach within 100 Italian miles of the Russian coasts, and I find that this extraordinary pretension has been adopted from, and is supposed to be justified by the XIIth Article of the Treaty of Utrecht.

Now I pass over a good many pages of the correspondence and come to page 12, where there is an important letter, from Lord Stowell, which my friend Mr Carter read; and you will see that Lord Stowell regarded, as every lawyer must regard, the assertion of exclusive control over an area as an assertion of exclusive dominion, territorial dominion, over that area.

Now Lord Stowell begins by saying :

I have perused these papers and it appears to me to be unsafe to proceed to any controversial discussion of the proposed Regulations till it is shown that they issue from a competent authority founded upon an acknowledged title of territorial and exclusive possession of the portions of the globe to which they relate.

and so on. Then he proceeds in the 2nd paragraph to say :

The territories claimed are of different species — islands — portions of the continent — and large portions of the sea adjoining.

He was a lawyer of great learning, ability and authority; and he treats it as a claim of territorial dominion. Then he proceeds :

I know too little of the history of their connection with either islands or continents to say with confidence that such a possession has in this case been acquired.—

and so forth.

He then proceeds to discuss the question, which has merely an academic interest at the present stage of the controversy, as to how for the mere right of discovery without actual possession would give the right to territory, with which we need not now trouble; and he finally winds up by saying :

I content myself with observing upon the Regulations themselves that they are carried to an extent that appears very unmeasured and insupportable.

Then on page 13 there is a communication to the Board of Trade, from which I read a short extract, in order to point out that it refers to the fact of there being some trade with Great Britain in the Behring Sea.

Two British ships nearly about the same time that the above ship sailed for the coast of Japan sailed for the whale fishery on the northwest coast of America, we believe into Behring Straits.

We have no doubt if we are protected in a *fair* trade (not with China) and fishery in the North Pacific Ocean, that British enterprise will find some islands in that great ocean which may have been overlooked by the Russians and Americans,

and so forth.

Then at page 14 there is an important letter from Lord Londonderry

who was then Foreign Secretary of Great Britain. It is dated the 18th January 1822. This letter refers to the north western coast of America. The second paragraph begins thus :

This document, containing Regulations of great extent and importance, both in its territorial and maritime bearings, has been considered with the utmost attention, and with those favourable sentiments which His Majesty's Government always bear towards the acts of a State which His Majesty has the satisfaction to feel himself connected, by the most intimate ties of friendship and alliance; and having been referred for the report of those high legal authorities, whose duty it is to advise His Majesty on such matters.

The undersigned is directed, till such friendly explanations can take place between the two Governments as may obviate misunderstanding upon so delicate and important a point, to make such provisional protest against the enactments of the said Ukase as may fully serve to save the rights of His Majesty's Crown, and may protect the persons and properties of His Majesty's subjects from molestation in the exercise of their lawful callings in that quarter of the globe.

The undersigned is commanded to acquaint Count Lieven that it being the King's constant desire to respect, and cause to be respected by his subjects in the fullest manner, the Emperor of Russia's just rights, His Majesty will be ready to enter into amicable explanations upon the interests affected by this instrument, in such manner as may be most acceptable to His Imperial Majesty.

In the meantime, upon the subject of this Ukase generally, and especially upon the two main principles of claim laid down therein, viz, an exclusive sovereignty alleged to belong to Russia over the territories therein described, as also the exclusive right of navigating and trading within the maritime limits therein set forth, his Britannic Majesty must be understood as hereby reserving all his rights, not being prepared to admit that the intercourse which is allowed on the face of this instrument to have hitherto subsisted on those coasts, and in those seas, can be deemed to be illicit, or that the ships of friendly Powers, even supposing an unqualified sovereignty was proved to appertain to the Imperial Crown in these vast and very imperfectly occupied territories, could, by the acknowledged law of nations, be excluded from navigating within the distance of 100 Italian miles as therein laid down from the coast, the exclusive dominion of which is assumed (but, as His Majesty's Government conceive, in error) to belong to His Imperial Majesty the Emperor of All the Russias.

I have already pointed out the position which Mr Quincy Adams took up : that the United States can admit no part of this claim. I now call attention to the position which Lord Londonderry, representing Great Britain, took up; and I say, as I said in reference to the other assertion of the United States, that Great Britain never departed from that position.

Now on the next page, page 15, is a communication dated 19th February, 1822, from Mr Stratford Canning who was then in Washington. Referring to an interview with Mr Adams, he says :

Mr Adams gave me to understand that it was not the intention of the American Cabinet to admit the claim thus notified on the part of Russia. His objection appears to lie more particularly against the exclusion of foreign vessels to so great a distance from the shore.

I have to point out that so far the southern boundary of Russian possessions is concerned, it had only the indirect interest for the United States that I have mentioned.

Then the attention of the Foreign Office is further drawn to the matter by the Hudson's Bay Company, on page 15. I need not read that.

On page 17 is an important memorandum by the Duke of Wellington, in these terms :

In the course of a conversation which I had yesterday with Count Lieven, he informed me that he had been directed to give verbal explanations of the Ukase respecting —

I ask the attention of the Tribunal to the language used — the north-west coast of America.

Where is there any limitation to be found that the withdrawal of the Ukase was confined to the Ocean south of the Aleutians?

These explanations went, he said, to this, that the Emperor did not propose to carry into execution the Ukase in its extended sense. That His Imperial Majesty's ships had been directed to cruize at the shortest possible distance from the shore in order to supply the natives with arms and ammunition, and in order to warn all vessels that that was His Imperial Majesty's dominion ; and that His Imperial Majesty had besides given directions to his Minister in the United States to agree upon a Treaty of Limits with the United States.

You see, Mr President, this is very like the echo of the communication which Mr Middleton records, not with Count Lieven, but with another Russian Minister, when he is informed that Russia cannot withdraw what has been done in the way of giving orders, but that he may rest assured that those orders will not be acted upon, and that the orders sent out will be only to exercise control within the limits recognized by international law.

The Duke of Wellington proceeds to say :

It appears here that this explanation when given will be very little satisfactory ; and that at best it is only a verbal explanation of a written and published Ukase, the terms of which, however contrary to the law of Nations and protested against by us, must be the rule for our merchants and traders till we can obtain some document in writing which will alter it. This is the sense in which I propose to act at Vienna upon this part of the instructions, and it is desirable that I should be informed whether we have any claim to territory on the north-west coast of America, and what are the opinions and reasonings of the civilians upon the question of *dominion on the sea*.

This letter is clear and businesslike as one would have expected from the Duke of Wellington ; and I need not remind the Tribunal that at this time, although the marine league limit had been pretty generally recognized, it certainly had not been so universally fixed and recognized as in later years.

Then he goes on :

The Russian Ministers will very probably assimilate their claim of dominion as thus verbally explained to the claim which we are supposed to have of dominion in the Narrow Seas, which it was attempted to bring into discussion at the Congress at Vienna in 1815. We avoided the discussion, and explained the practice of giving and receiving salutes prevailing in the British Navy in a manner satisfactory to all parties. But we never relinquished the claim of the dominion.

On the other hand, we have not recently claimed the dominion in a proclamation, and warned others not to approach it.

I now pass on to the letter from Mr George Canning to the Duke of Wellington, which will be found at page 21. He says :

Your Grace is already in possession of all that has passed both here and at St. Petersburg on the subject of the issue in September of last year, by the Emperor of Russia, of an Ukase indirectly asserting an exclusive right of sovereignty from Behring's Straits to the 51st degree of north latitude on the west coast of America, and to the 45th degree North on the opposite coast of Asia, and (as a qualified exercise of that right) prohibiting all foreign ships, under pain of confiscation, from approaching within 100 Italian Miles of those coasts.

He then alludes to the opinions of Lord Stowell, and of the Advocate General, and refers to the question of title founded on mere discovery and the point whether possession was necessary. I need not trouble you with that. Then follow some sentences which are important.

With respect to the other points in the Ukase which have the effect of extending the territorial rights of Russia over the adjacent seas to the unprecedented distance of 100 miles from the line of coast, and of closing a hitherto unobstructed passage, at the present moment the object of important discoveries for the promotion of general commerce and navigation, these pretensions are considered by the best legal authorities as positive innovations on the right of navigation. As such, they can receive no explanation from further discussion, nor can by possibility be justified. Common usage, which has obtained the force of law, has indeed assigned to coasts and shores an accessorial boundary to a short limited distance for purposes of protection and general convenience, in no manner interfering with the rights of others, and not obstructing the freedom of general commerce and navigation.

But this important qualification the extent of the present claim entirely excludes, and when such a prohibition is, as in the present case, applied to a long line of coasts, and also to intermediate islands in remote seas where navigation is beset with innumerable and unforeseen difficulties, and where the principal employment of the fisheries must be pursued under circumstances which are incompatible with the prescribed courses, all particular considerations concur, in an especial manner, with the general principle, in repelling such a pretension as an encroachment on the freedom of navigation, and the unalienable rights of all nations.

I have indeed the satisfaction to believe, from a conference which I have had with Count Lieven on this matter, — that upon these two points, — the attempt to shut up the passage altogether, and the claim of exclusive dominion to so enormous a distance from the Coast, — the Russian Government are prepared entirely to waive their pretensions. The only effort that has been made to justify the latter claim was by reference to an Article in the Treaty of Utrecht, which assigns 30 leagues from the Coast as the distance of prohibition. But to this argument it is sufficient to answer that the assumption of such a space was, in the instance quoted, by stipulation in a Treaty, and one to which, therefore, the party to be affected by it had (whether wisely or not) given its deliberate consent. No inference could be drawn from that transaction in favour of a claim by authority against all the world.

I have little doubt, therefore, but that the public notification of the claim to consider the portions of the ocean included between the adjoining coast of America and the Russian empire as a *mare clausum*, and to extend the exclusive territorial jurisdiction of Russia to 100 Italian miles from the coast, will be publicly recalled, and I have the King's commands to instruct your Grace further to require of the Russian Minister (on the ground of the facts and reasonings furnished in their despatch and its inclosures) that such a portion of territory alone shall be defined as belonging to Russia as shall not interfere with the rights and actual possessions of His Majesty's subjects in North America.

That is a statement which is I think accurate in point of law, and you will see that while it is emphatic and distinct in its opposition to the claim

of exclusive dominion 100 miles from the coast, it professes the willingness of the Government to enter into negotiations for the delimitation of the disputed territory.

On page 24 is a Confidential Memoir, which I need not read; I may say that it re-states the case in defence of the Ukase; claims that they might have treated the Northern part of the Pacific as a shut sea, and so forth; but that there are overtures for the settlement of the subject, and that the Russian Government does not desire to press the matter to the full extent.

The Duke of Wellington, having received that letter which I have read from Mr Canning, writes to Count Lieven in these terms. I am reading from page 25 :

We object to the ukase on the grounds :

1. That his imperial Majesty assumes thereby an exclusive sovereignty in North America of which we are not prepared to acknowledge the existence or the extent. Upon this point, however the Memorandum of Count Nesselrode does afford the means of negotiation, and my Government will be ready to discuss it either in London or St Petersburg whenever the state of the discussions on the other question arising out of the ukase will allow of the discussion.

The second ground on which we object to the Ukase is that His Imperial Majesty thereby excludes from a certain considerable extent of the open sea vessels of other nations.

We contend that the assumption of this power is contrary to the law of nations, and we cannot found a negociation upon a paper,

That is the Confidential Memoir which I have just referred to. —

in which it is again broadly asserted. We contend that no Power whatever can exclude another from the use of the open sea. A Power can exclude itself from the navigation of a certain coast, sea, etc., by its own act or engagement, but it cannot by right be excluded by another. This we consider as the law of nations, and we cannot negotiate upon a paper in which a right is asserted inconsistent with this principle.

Nothing could be stronger than that. Then follows an incident in the process which I took the liberty of describing a little time ago — the process of climbing down; and I call attention expressly to the note from the Duke of Wellington. It is dated November 29th, 1822.

Since I wrote to you yesterday I have had another conversation with the Russian Ministers regarding the Ukase.

It is now settled that both the memorandums which I inclosed to you should be considered as *non avenues*, and the Russian Ambassador in London is to address you a note in answer to that of the late Lord Londonderry, assuring you of the desire of the Emperor to negotiate with you upon the whole question of the Emperor's claims in North America, reserving them all if the result of the negociation should not be satisfactory to both parties.

Therefore the position was that the Confidential Memoir that I mentioned was considered as *non avenue*, and the matter was at large for negotiation.

Now on page 31 is an important memorandum to Mr Canning from Count Lieven, who was then in London. It is the second passage I refer to, — it is in these words : —

Avant de quitter Vérone, le Soussigné a reçu l'ordre de donner au Gouverne-

ment de Sa Majesté britannique une nouvelle preuve des dispositions connues de l'Empereur, en proposant à son Excellence Mr Canning, principal secrétaire d'État de Sa Majesté Britannique pour les Affaires étrangères (sans que cette proposition puisse porter atteinte aux droits de Sa Majesté Impériale, si elle n'est pas acceptée), que de part et d'autre la question de droit strict soit provisoirement écartée, et que tous les différends auxquels a donné lieu le Règlement dont il s'agit, s'aplanissent par un arrangement amical fondé sur le seul principe des convenances mutuelles et qui serait négocié à Saint-Petersbourg.

Then follows a long dispatch from Count Nesselrode to Count Lieven, which is to a large extent, indeed I think it is entirely conversant with the question of the territorial claim. I think I am right in saying that there is nothing about the maritime jurisdiction portion of the claim.

I now may pass over a good many of these letters until I come to page 38, a despatch from Mr George Canning, to Sir Charles Bagot :

SIR : I have the honour to inclose for your Excellency's information, the copy of a despatch received from His Majesty's Minister in America upon the subject of the Russian Ukase relating to the north-west coast of America, also of a letter from the Ship-owners' Society upon the same subject, and of a Memorandum of my reply to that letter.

Your Excellency will observe from Mr Stratford Canning's despatch that the Government of the United States are desirous to join with that of His Majesty in bringing forward some proposition for the definitive settlement of this question with Russia.

We have no precise information as to the views of the American Government, Mr Rush not having yet received any instructions upon the subject. It seems probable, however, that the part of the question in which the American Government is peculiarly desirous of establishing a concert with this country is that which concerns the extravagant assumption of maritime jurisdiction. Upon this point, it being now distinctly understood that Russia waives all her pretensions to the practical exercise of the rights so unadvisedly claimed, the only question will be as to the mode and degree of disavowal with which Great Britain and the United States might be respectively satisfied.

Upon this point, therefore, such a concert as the United States are understood to desire will be peculiarly advantageous ; because, supposing the disavowal made, there is no disposition on the part of His Majesty to press hard upon the feelings of the Emperor of Russia, and it would certainly be more easy for His Majesty to insist lightly on what may be considered as a point of national dignity, if he acted in this respect in concert with another Maritime Power, than to exact any less degree, either of excuse for the past or of security for the future, than that other Power might think necessary.

Great Britain and the United States may be satisfied jointly with smaller concessions than either Power could accept singly, if the demands of the other were likely to be higher than its own.

I therefore think it best to defer giving any precise instructions to your Excellency on this point until I shall have been informed of the views of the American Government upon it.

In the meantime, however, you will endeavour to draw from the Russian Government a proposal of their terms, as we should undoubtedly come much more conveniently to the discussion, and be much more likely to concert an agreement upon moderate terms with the American Government if a proposal is made to us, than to agree in originating one which would be satisfactory at once to both Governments and to Russia.

The other part of this question, which relates to territorial claim and boundary, is perhaps susceptible of a separate settlement ; of the two principles on which the settlement could be made, viz., joint occupancy or territorial demarcation, the latter is clearly preferable.

I do not think I need trouble you with that. Then they suggest drawing a line at 57°. You see from that, Mr. President, that, in private communication at all events, the Russian Ministers were receding from the assertion of this exclusive maritime jurisdiction; that is very clearly shown in the next memorandum from Count Nesselrode to Count Lieven, on page 39. The first clause of the instructions to the Russian cruisers I translate thus : —

That the commanders of our ships of war ought to exercise their surveillance as near as possible to the continent, that is to say, over an extent of sea which reaches a cannon shot from the coast —

In other words, the marine league —

and that they ought not to extend this surveillance beyond latitudes in which the American Company has effectively exercised its right of hunting and fishing since the epoch of its creation, ...

Clause 2. That this surveillance ought to have for its object to repress all fraudulent commerce and all attempts to injure the Company in troubling the coasts frequented by its hunters and fishers, preventing all enterprises having for their object to furnish to the aboriginal inhabitants of the country without the consent of the authorities fire-arms, munitions of war and swords.

So there you see, still further bearing out the communications between the English Ministers, the Russian instructions to their own officers, that they are to exercise their surveillance over an extent of ocean reaching only to the extent of a cannon shot from the shore; and this we know is now treated as three miles.

Now we come to a point at which this 100 mile claim absolutely disappears from the controversy. On page 45 Mr Lyall, the Chairman of a Committee of ship-owners who were interested in this matter, writes to Mr George Canning, on the 19th of November 1823; and he refers to a previous communication.

When you had the goodness to inform me that a representation had been made to that Government, and that you had reason to believe that the Ukase would not be acted upon; and very shortly after this communication I was informed, on what I considered undoubted authority, that the Russian Government had consented to withdraw that infounded pretension.

Then he says :

The Committee of this Society being about to make their Annual Report to the ship-owners at large, it would be satisfactory to them to be able to state therein that official advices had been received from St. Petersburg that the Ukase had been annulled; and should that be the case, I have to express the hope of the Committee to be favored with a communication from you to that effect.

Whereupon, Mr Canning, before he answers Mr Lyall, communicates with Count Lieven and says : Here is a question which has been put to me. What am I to tell these shipowners?

I have received the inclosed letter from the Ship-owners Society; my answer to it must be in writing, and not long after it will be in print.

I wish, therefore, that you should know beforehand what the nature of it will be, and for that purpose I inclose a draft of it, which I will be obliged to you if you

will return with any remark that may occur to you, returning also Mr Lyall's letter.

Here is Count Lieven's answer, which I translate thus :

I am infinitely obliged for your communication that you have been good enough to make me. In returning the two annexed inclosures to your letter, and in availing myself of the permission that you have had the goodness to give me, I beg the liberty of observing to you that it will be desirable that the passage marked in pencil in the minute of your response should be substituted by the announcement.

Then follow the words in inverted comas.

“That the new instructions given to the commanders of Russian cruisers are conceived with the object of preventing disturbance between the Russian vessels and those of other nations, and that in general they may be considered as having suspended provisionally the effect of the Imperial Ukase of the 4th of September 1821”.

The President. — That is not quite right. It should be as being such as to suspend.

Sir Charles Russell. — That is still stronger ; I am much obliged to you.

Thereupon Mr. Secretary Canning by his Secretary communicates to the ship-owners in this way :

Mr Canning cannot authorize me to state to you in distinct terms that the Ukase has been *annulled*, because the negotiation to which it gave rise is still pending, embracing, as it does, many points of great intricacy as well as importance.

But I am directed by Mr Canning to acquaint you that orders have been sent out by the Court of St. Petersburg to their Naval Commanders calculated to prevent any collision between Russian ships and those of other nations, and, in effect, suspending the Ukase of September 1821.

Here we have got to a definite point : the suspension of the Ukase of 1821. What had been done therefore amounted to this — a paper assertion of territorial sovereignty by the Ukase, and by the Charter under it, communicated to two foreign Powers ; a prompt refusal by those Powers to recognize the rights on the basis on which it purported to support them : and finally, a suspension of the Ukase, fully admitted by November of 1823. Did either Russia — it is no longer a question of what Great Britain did — but did either Russia or Great Britain ever retire from that position ? Clearly not.

Then follows a long correspondence, a great part of which is conversant with the territorial claim, with which I need not trouble you ; but there is rather an important passage on page 65 in Mr George Canning's letter. Certain projects had passed between the parties which it would take me a great deal too long to go through. But on the 24th of July, 1824, the points in difference had been reduced to very few ; and Mr George Canning writing to Sir C. Bagot says :

The “ *Projet* ” of a Convention which is inclosed in my No 26 having been communicated by me to Count Lieven, with a request that his Excellency would note any points in it upon which he conceived any difficulty likely to arise, or any explanation to be necessary, I have received from his Excellency the Memorandum a copy of which is herewith inclosed.

Your Excellency will observe that there are but two points which have struck Count Lieven as susceptible of any question. The first, the assumption of the base of the mountains instead of the summit as the line of boundary.

That, you will understand, Mr President, relates merely to the *lisière*.

The second, the extension of the right of the navigation of the Pacific to the sea beyond Behring's Straits.

How can it be said that there was any question about the intervening sea, that is Behring Sea itself, when the question had resolved itself into the right of navigation in the sea *beyond* Behring Straits.

As to the first, no great inconvenience can arise from your Excellency (if pressed for that alteration) consenting to substitute the summit of the mountains instead of the seaward base, provided always that the stipulation as to the extreme distance from the coast to which the *lisière* is in any case to run be adopted (which distance I have to repeat to your Excellency should be made as short as possible), and provided a stipulation be added that no forts shall be established or fortifications erected by either party on the summit or in the passes of the mountains.

As to the second point, it is perhaps, as Count Lieven remarks, new. But it is to be remarked in return, that the circumstances under which the additional security is required will be new also.

By the territorial demarcation agreed to in this Projet Russia will become possessed, in acknowledged sovereignty of both sides of Behring's Straits.

The Power which could think of making the Pacific a *mare clausum* may not unnaturally be supposed capable of a disposition to apply the same character to a strait comprehended between two shores of which it became the undisputed owner; but the shutting up of Behring's Straits, or the power to shut them up hereafter, would be a thing not to be tolerated by England.

Nor could we submit to be excluded, either positively or constructively, from a sea in which the skill and science of our seamen has been and is still employed in enterprises interesting not to this country alone, but to the whole civilized world.

The question of the Northwest passage, if I am not wrong, was then a matter that was agitating the minds of men of enterprise.

The protection given by the Convention to the American coasts of each Power may (if it is thought necessary) be extended in terms to the coasts of the Russian Asiatic territory; but in some way or other, if not in the form now prescribed, the free navigation of Behring's Straits and of the seas beyond them must be secured to us.

These being the only questions suggested by Count Lieven, I trust I may anticipate with confidence the conclusion and signature of the Convention, nearly in conformity to the "Projet", and with little trouble to your Excellency.

It is almost needless that I should pause here. They were discussing the freedom of navigation in the Arctic Ocean beyond the Behring Sea, and about the avenue to the Arctic Ocean, the Behring Strait; and yet it is supposed that although we have got to that point, yet the questions as to the intervening sea by which alone the Behring Straits could be approached were not already settled; namely, that there was free navigation, according to the rules of general international law.

In order to put this matter beyond the possibility of doubt, will you be good enough to turn back to page 63.

Mr Carter. — You do not read the letter at the bottom of the page.

Sir Charles Russell. — I am going to read it in a moment. At the top of page 63 the projet which is there referred to is in these words :

It is agreed between the High Contracting Parties that their respective subjects shall enjoy the right of free navigation along the whole extent of the Pacific Ocean, comprehending the sea within Behring's Straits, and shall neither be troubled nor molested in carrying on their trade and fisheries, in all parts of the said ocean, either to the northward or southward thereof.

It being well understood that the said right of fishery shall not be exercised by the subjects of either of the two Powers, nearer than 2 marine leagues from the respective possessions of the other.

That is the only limitation there made. But the point, of course, that I am upon is the other limitation, of the enjoyment of the right of free navigation along the whole extent of the Pacific Ocean, comprehending the sea within Bering Straits.

Then says Mr Canning the questions are limited to whether the base or the summit of the mountains is to be taken as the inside boundary of the lisière. Secondly, the extension of the right of the navigation of the Pacific to the sea beyond Behring Straits.

I now turn to page 66 to read what Mr Carter drew my attention to, and which I was going to read. There was, a question whether or not there should be any formal renunciation, or whether a formal renunciation was necessary, or whether the treaty should be left to speak for itself; and Mr Adams, writing from Washington, says—

A convention concluded between this Government and that of Russia for the settlement of the respective claims of the two nations to the intercourse with the northwestern coast of America reached the Department of State a few days since

The main points determined by this instrument are, as far as I can collect from the American Secretary of State, (1) the enjoyment of a free and unrestricted intercourse by each nation with all the settlements of the other on the northwest coast of America; and (2) a stipulation that no new settlements shall be formed by Russia south, or by the United States north, of latitude 54 degrees 40 minutes.

The question of the *mare clausum*, the sovereignty over which was asserted by the Emperor of Russia in his celebrated Ukase of 1821, but virtually, if not expressly, renounced by a subsequent declaration of that sovereign, has, Mr Adams assures me, not been touched upon in the above-mentioned Treaty.

Mr Adams seemed to consider any formal stipulation recording that renunciation as unnecessary and supererogatory.

It had been renounced, and the Treaty was inconsistent with it; and therefore, says Mr Adams — and quite rightly, I think — any formal or express renunciation would be simply requiring a great Power to do something which might be regarded as more or less of a humiliation, and was not at all necessary.

Now I am enabled to hurry on. Let me just remind the Tribunal of the dates. The Baron de Tuyl, incident had occurred in July of 1824. The Treaty with America had been signed, and, Mr Adams having declared that the treaty must speak for itself, had been signed without any modification. The object of the proposed modification being, as you will recollect, that north of 59 degrees 30 minutes, Russia would like to have

it understood that there was no right to visit the creeks, gulfs, interior seas, etc., for the ten years' period. Baron de Tuiyll had been informed by Mr Adams, that he had "no power to construe the Treaty; it must speak for itself;" Obviously some suggestion of the same kind had been made by Count Lieven to Mr George Canning, to see whether in the English treaty, which was not then at the same stage of completion, some modification of the same sort could not be introduced; and when the American treaty comes to hand, Mr George Canning reads it, and thereupon, on the 25th of October, meets and meets successfully, Count Lieven's point. On the 28th October, 1824, page 72, he says :

My dear Count Lieven,

I cannot refrain from sending to your Excellency the inclosed extract from an American newspaper, by which you will see that I did not exaggerate what I stated to you, as the American construction of the Convention signed at St. Petersburg.

Count Lieven had obviously been trying to effect the same thing with England that Baron de Tuiyll had tried to effect with the United States.

It is to this construction that I referred, when I claimed for England (as justly quoted by Count Nesselrode) whatever was granted to other nations.

No limitation here of 59 degrees.

Believe me, etc.

GEORGE CANNING.

Yet, says my learned friend, Mr Carter, we inherited this secret meaning which was put by Russia upon the 1824. Treaty with America : I do not think he said, but rather suggested, that it was accepted by the United States. After that, he says, comes the treaty with Great Britain; and therefore, as you find the one clause borrowed from the other, you must give it the same meaning in each. Therefore you are to put upon the second the meaning which Baron de Tuiyll suggested, even if no modification were made, might be put upon the first, although that secret meaning, or a suggestion of it, was never conveyed to Great Britain.

Mr Justice Harlan. — What does he mean there by " No limitation here of 59 degrees? "

Sir Charles Russell. — Do you not see, Judge, that Baron de Tuiyll's memorandum was directed to getting an admission that the right to visit the interior seas, creeks, harbors, etc., did not apply to Russian possessions north of 59 degrees?

Mr Justice Harlan. — Yes; but his memorandum was after that letter. The Baron de Tuiyll memorandum in Mr Adams' diary, was after the date of the Canning letter.

Sir Charles Russell. — No; on the contrary, I have just been stating the opposite.

Mr Justice Harlan. — The quotation from Mr Adams' diary is under date of December 28, 1884, and this letter you are reading from is dated October 25, 1824.

Sir Charles Russell. — I think, Sir, there must be some mistake.

Mr Justice Harlan. — That was the reason I asked you.

Sir Charles Russell. — It was quite a proper reason, Sir. I think that date should have been July 24th, instead of December 24th, because by December 24th the Treaty had already been signed and ratified. It was all past and gone. It was in April of 1824, and therefore that must be a mistake in date.

Sir Richard Webster. — I think it is a mistake in Mr Blaine's letter. I will trace it out.

Sir Charles Russell. — I think, Sir, it is clear that the date of December 24th, as the date on which the conversation took place, must be inaccurate, for the reason I have given; because the American Treaty was signed and ratified, I think, in April of 1824 — the 17th of April, 1824.

Mr Carter. — It was signed, but where is the evidence that it was then ratified?

Sir Charles Russell. — We will follow it up, if it be material. It does not seem to me to be of much importance, one way or the other.

Mr Justice Harlan. — I only asked because you seemed to be expounding this letter of October 25th 1824. I gather from the minute in Mr Adam's diary that when his conversation occurred with Baron de Tuyl, the Treaty had not then been ratified.

Sir Charles Russell. — Certainly Judge; so do I, also. But let me explain what the position of things is. We will get the dates right, and put them before you at our next meeting. But we can discuss the point wholly apart from dates.

Mr Justice Harlan. — Yes.

Sir Charles Russell. — What appears is this: After the Treaty had been agreed upon and signed, but before its ratification, Baron de Tuyl sought to have it modified in the sense set out in Mr Adams' diary. Mr Adams' answer was: "The Treaty is the Treaty; that must speak for itself." At the same time, or at a later period, it may be, they were endeavouring to get the same limitation into the English treaty. What was that limitation? It was this.

It is not the intention of Russia to impede the free navigation of the Pacific Ocean. She would be satisfied with causing to be recognized, as well understood and placed beyond all manner of doubt, the principle that beyond 59 degrees 30 minutes no foreign vessel can approach her coasts and her islands, nor fish nor hunt within the distance of two marine leagues.

That is to say, beyond 59 degrees 30 minutes.

Accordingly, when Count Lieven and Mr George Canning are discussing the matter, Count Lieven seeks to have introduced into the English Treaty, a limitation of that right of approaching creeks and interior seas, to 59 degrees 30 minutes. I hope you follow me, Judge.

Mr Justice Harlan. — I do.

Sir Charles Russell. — In other words, the ten-year clause is limited to

59°30', and not further north, and accordingly, if you will turn to page 69 of the 2nd Volume of the Appendix to the British Case, you will see that in their Contre-Projet, article III, it is proposed :

That as to the possessions of the two Powers, designated in the preceding articles, namely, to 59°30' minutes of north latitude, but not farther, the respective vessels and those of their subjects shall, for ten years, from the 5 (17) April, 1824, have the reciprocal right of frequenting freely the gulfs, harbours, creeks, etc.

Mr Canning then gets the newspaper description of the American Treaty. Thereupon he writes to Count Lieven, in effect : “ You have been pressing me to agree to a limitation of the right to frequent interior creeks, seas, etc., to the point of 59°30', and no farther north, and you have been urging that upon me because you say that is the American Treaty. I now send you enclosed an account of the American Treaty”, — and he winds up his letter :

No limitations here of 59°.

On pages 71 and 72 is the passage which is enclosed :

Extract from the National Intelligencer, of August 3, 1824.

CONVENTION WITH RUSSIA. Mr Lucius Bull, who arrived in this city a few days ago, was the bearer of despatches from our Minister at St. Petersburg. By these it appears that a Convention was concluded on the 5th (17th) April last between Mr Middleton, on the part of the United States, and Count Nesselrode and Mr Poletica on the part of Russia. We understand that the Convention consists of six Articles, in which all the points indispute between the two Governments are adjusted in a manner the most honourable and advantageous to this country.

The 1st Article authorizes the free navigation of the Pacific Ocean by both Parties, and recognizes the right of fishing and of landing on all points of the west coast not already occupied, in order to trade with the aborigines.

2nd Article provides that the citizens or subjects of neither country shall land at points occupied by either, without the permission of the Governor or Commandant.

3rd Article fixes the boundary-line at 54 degrees, north of which the United States are not to form Establishments, and south of which Russia cannot advance.

4th Article allows free entrance to both Parties for ten years into all the gulfs, harbours, etc., of each for the purposes of fishing and trading with the natives.

5th Article interdicts a trade in fire-arms and liquors, and provides that violations of this Article shall be punished not by seizure of the vessel, but by penalties to be prescribed by each Government on its own citizens or subjects.

6. This Article prescribes that the ratification shall be exchanged within ten months from the date of the Treaty.

This Convention may be regarded as a second signal effect of the manly and independent Message of our President to the late Congress. If the Emperor Alexander has left it to our own Government to fix the terms of the Treaty, it could not more completely have secured all our interests in the Pacific. We congratulate the country upon this new evidence of the excellence of the system which has been pursued by our present Administration.

Now, in the face of that, can anything in this world be clearer why it is that Mr Canning says, “ you have been pressing me about this American Treaty. Here is the American Treaty. No such limitation north of 59 degrees at all. ”

Now, sir, I think I have explained the point you referred to.

Mr Justice Harlan. — Will you point me again to the document which shows that Count Lieven was pressing that important view about 59 degrees?

Sir Charles Russell. — That appears only from the *Projet* to which I have already referred. It is called Counter Draft of the Russian Plenipotentiaries. It is on page 69.

Mr Justice Harlan. — Which of the articles is that?

Sir Charles Russell. — Article III — beginning with the first paragraph of Article III.

My friend says in reference to the suggestion, that I made — a suggestion which I thought was probable, namely, that he had been putting forward the American Treaty, that there is no evidence in the correspondence that he was using the American Treaty as an argument in that direction. That does not appear in the correspondence, but he was pressing forward that *projet*; and the answer is the answer I have given. He says triumphantly to Count Lieven, « No limitation here of 59 degrees », and in effect he says “ We are not going to be satisfied with less than the United States people have secured under their Treaty. ” That is the purport and character of the negotiation, and on that basis the negotiation proceeds.

I am afraid I shall have to go through the Treaty at some length, and I would prefer to do that to-morrow.

The Tribunal accordingly adjourned until Wednesday, May 17, 1893, at 11.30 o'clock A. M.

TWENTY-FOURTH DAY. MAY 17TH, 1893

Sir Charles Russell. — Mr President and Gentlemen, yesterday I stated that the Baron de Tuyl incident as recorded in Mr Quincy Adams' diary, under the date of December 24, was, as we conceived, inaccurately stated as having taken place in December. We thought we had discovered extrinsic reasons showing that it was at an earlier date; but I find, on further examination with my learned friends, that I was not well founded in that, and that the date is correctly recorded in the diary as being in December, 1824. I want to explain in a sentence how that whole matter arose.

The President. — Have you ascertained if it was before the ratification?

Sir Charles Russell. — Yes.

The President. — What is the date of the ratification?

Sir Charles Russell. — It was subsequent. The actual ratification was, I think, in January, 1825. I have not got it accurately in my mind at the moment; but my learned friend suggests that date to me.

Sir Richard Webster. — It will be found at page 277 of Volume I of Appendix to the United States Case.

Mr Justice Harlan. — The Treaty in English and French is found at page 76 of your volume.

Sir Charles Russell. — Yes.

The President. — It is dated the 11th of January, 1825.

Sir Charles Russell. — Now I was about to explain, as I can do in a sentence, without troubling the Members of the Tribunal to refer to any document, the origin of the representation of Baron de Tuyl and also the attempt at limitation which is mentioned in the *contre-projet*, and which is referred to in the correspondence of August, 1824. This is the explanation. I have told the Tribunal that this Commercial Company was a very important and influential Company. It was the Company which, as the diplomatic correspondence has shewn and the statement of the Russian representative has shewn, had been largely instrumental in obtaining the Ukase of 1821. Persons in high positions and of commanding influence apparently were concerned in it, and after the Treaty with the United States had been agreed to and signed, but before the exchange of ratifications, there had been a meeting which was called a Council of Dignitaries; and that was held in July, 1824. That Conference of Dignitaries was undoubtedly held at the instance of this same Company; and, in view of the construction

The Baron de Tuyl
incident.

which that Company was putting upon the Treaty concluded with the United States, and as the outcome of that Conference of Dignitaries, two things took place at a later date.

The conference was in July. In August 1824 we have in the communications with Mr Canning the attempted limitations in the *contre-projet* that I referred to yesterday, and later we have the representations in December of the same year of Baron de Tuyl at Washington. Now as regards that Council of Dignitaries, my learned friend, Mr Carter, did not, and I should have been surprised if he had, lay any stress upon it so far as the document itself is concerned, for the position of things is this : it is a record of a private meeting of a number of distinguished persons. It records certain views and opinions as to the Treaty, which views are expressed to have been not the unanimous views of the members of the conference, but of a majority of the conference. The document was never communicated to the United States. It was never communicated to Great Britain. It lay buried and forgotten, until when examining the records with a view to this controversy it was disinterred. But as far as either the United States, or Great Britain is concerned, neither the documents, nor the results of that conference, were communicated to either one or other of the Powers; and it is entirely out of place, therefore, in the consideration of what the construction of the United States Treaty in fact is. I have dealt with that, and will not recur to it. Mr Adams took the position which was the only position he could take. We have entered into a definite Treaty : the construction of that Treaty is not for me. We stand by it, whatever its purport and effect are. As regards the English negotiations, I do not require to recur to them again to mention the suggested limitation, but if there is anything in the mind of the Court which I could help to explain, I should be glad to, because I desire that my argument should at least be clearly apprehended by every member of the Tribunal.

Mr Justice Harlan. — The Président was asking me when the Senate ratified the Treaty. I do not know the exact date, but it was between December 6th, 1824, and the 11th January, 1825.

The President. — I asked because it would seem that he might still have been at liberty to alter it, as it was not ratified by the Senate. I mean it might have been altered if he had not insisted on his interpretation of it.

Sir Charles Russell. — I should like to say this, especially in reference to an observation that Mr Senator Morgan has made more than once in this matter, that no executive minister of the United States, even in the name of the Executive, could alter the Treaty. There is no power to do that.

The President. — But it had not passed the Senate, and he was not bound. He was free to go on negotiating.

Sir Charles Russell. — Yes, but before it reached the point to which it had then attained there must have been some means, I should appre-

hend, of obtaining the views of the Senate upon it, because the Treaty was agreed to by the United States, and all that was required was the formal ratification and exchange of formal documents, and ratification implies the assent of the Senate. It is not to be supposed that the United States Government, not having the power to make a treaty which would be binding, would proceed to those lengths without having first ascertained what the views of the Senate would be.

Mr Justice Harlan. — The Senate does not know anything about a Treaty under our system, until it is concluded by the Executive Department and submitted to that body.

Sir Charles Russell. — That is very likely correct, but I do not suggest anything inconsistent with that.

Lord Hannen. — My impression is that the ratification is something different from the assent. It would be treated as a formality.

Sir Charles Russell. — So I understand.

Mr Justice Harlan. — That is true.

Sir Charles Russell. — But I did not understand what was the position of the Senate in December; and though I cannot think it important, I confess, I do not know where Mr Justice Harlan finds that the adoption by the Senate was after December?

Mr Justice Harlan. — Because the date in Mr Adams' diary is December 6th, 1824, and the proclamation of the President is the 11th January 1825.

Sir Charles Russell. — Quite so; that is a mere formal business. The point is, when was the assent of the Senate given?

The President. — He says on the 6th December — “I added the Convention would be submitted immediately to the Senate.” That is in the diary which you read yesterday, and that shows that the Executive was at liberty to continue negotiations, but in reality they insisted on their view.

Sir Charles Russell. — Yes, that would appear to be so. Then it stands thus : Neither party being bound, there was the opportunity, if the Senate desired, to fall in with the views of negotiating the Treaty upon different lines and submitting it upon different lines to the Senate for its approval. But Mr Adams says : — No, the Treaty is the Treaty as it stands, and as it stands it has to be submitted to the Senate. It does not matter, as far as the strength of the argument is concerned, what is the state of things as regards the United States and as regards Great Britain. The suggestion emanating, as far as we can judge, from that Conference of Dignitaries, appears in the 3rd article of the *contre-projet* that I referred to yesterday. It is an attempt to limit the right of visitation in the gulfs, harbours and creeks. That is enclosed and sent by Sir Charles Bagot to Mr Canning in the letter which immediately precedes it of the 12th August 1824.

Now how was that suggestion met? I pass to page 72 of that same volume and there you will find a letter from Mr George Canning, Foreign

Minister in London, to Mr Stratford Canning, who was then at St. Petersburg, of the 8th December 1824.

Meanwhile, in the month of October previously, information had reached Mr Canning through the public channels of information what the terms of the Treaty as between the United States and Russia were, and accordingly Mr George Canning in October writes the short letter, that you now understand and appreciate, to Count Lieven, the important words of which are, after calling attention to the terms of the American Treaty : —

No limitation here of 59°.

He says the proposed limitation is out of the question. There is nothing of the sort in the American Treaty, and he will not have it in the English Treaty.

That is the purport of it. Now comes the formal detailed answer from Mr George Canning in London in reference to the *contre-projet*.

He says :

I inclose to you a copy (1) of the *projet* which Sir Charles Bagot was authorized to conclude and sign some months ago, and which we had every reason to expect would have been entirely satisfactory to the Russian Government.

(2) Of a *contre-projet* drawn up by the Russian Plenipotentiaries, and presented to Sir Charles Bagot at their last meeting before Sir Charles Bagot's departure from St. Petersburg.

(3) Of a despatch from Count Nesselrode, accompanying the transmission of the *contre-projet* to Count Lieven.

Then he goes on :

In that despatch, and in certain marginal annotations upon the copy of the *projet*, are assigned the reasons of the alterations proposed by the Russian Plenipotentiaries.

In considering the expediency of admitting or rejecting the proposed alterations, it will be convenient to follow the Articles of the Treaty in the order in which they stand in the English *projet*.

You will observe, in the first place, that it is proposed by the Russian Plenipotentiaries entirely to change that order, and to transfer to the latter part of the instrument the Article which has hitherto stood first in the *projet*.

To that transposition we cannot agree, for the very reason which Count Nesselrode alleges in favour of it, namely, that the " *économie* " or arrangement of the Treaty ought to have reference to the history of the negotiation.

The whole negotiation grows out of the Ukase of 1821.

So entirely and absolutely true is this proposition, that the settlement of the limits of the respective possessions of Great Britain and Russia on the north-west coast of America was proposed by us only as a mode of facilitating the adjustment of the difference arising from the Ukase by enabling the Court of Russia, under cover of the more comprehensive arrangement, to withdraw, with less appearance of concession, the offensive pretensions of that Edict.

It is comparatively indifferent to us whether we hasten or postpone all questions respecting the limits of territorial possession on the Continent of America, but the pretensions of the Russian Ukase of 1821 to exclusive dominion over the Pacific could not continue longer unrepealed without compelling us to take some measure of public and effectual remonstrance against it.

You will therefore take care, in the first instance, to repress any attempt to give this change to the character of the negotiation, and will declare without reserve that the point to which alone the solicitude of the British Government and the

jealousy of the British nation attach any great importance is the doing away (in a manner as little disagreeable to Russia as possible) of the effect of the Ukase of 1821.

That this Ukase is not acted upon, and that instructions have been long ago sent by the Russian Government to their cruizers in the Pacific to suspend the execution of its provisions, is true; but a private disavowal of a published claim is no security against the revival of that claim.

And so forth.

The Tribunal will forgive me if I ask permission to read one or two more passages, because I feel I ought to apologize for labouring this point, which we submit is absolutely clear; but, as the Tribunal have not thought fit to make any intimation, nor my learned friends either, of course I can leave no ground untouched which demonstrates beyond question the position we assume. The concluding sentences are as follows : —

The right of the subjects of His Majesty to navigate freely in the Pacific cannot be held as matter of indulgence from any Power. Having once been publicly questioned, it must be publicly acknowledged.

We do not desire that any distinct reference should be made to the Ukase of 1821; but we do feel it necessary that the statement of our right should be clear and positive, and that it should stand forth in the convention in the place which properly belongs to it, “— that is, the first Article, —” as a plain and substantive stipulation, and not be brought in as an incidental consequence of other arrangements to which we attach comparatively little importance.

Now, I beg attention to the remainder of this.

This stipulation stands in the front of the Convention concluded between Russia and the United States of America; and we see no reason why upon similar claims we should obtain exactly the like satisfaction.

The word “not” is left out there. The sentence which follows is particularly significant.

For reasons of the same nature, we cannot consent that the liberty of navigation through Behring Straits should be stated in the Treaty as a boon from Russia.

Of course, if there was to be navigation through Behring Straits, there must be navigation through Behring Sea, which leads to Behring Straits.

The tendency of such a statement would be to give countenance to those claims of exclusive jurisdiction against which we, on our own behalf, and on that of the whole civilized world, protest.

No specification of this sort is found in the Convention with the United States of America, and yet it cannot be doubted that the Americans consider themselves as secured in the right of navigating Behring Straits and the sea beyond them.

Mr Justice Harlan. — May I ask you, Sir Charles, whether you contend that the Ukase of 1821 was intended to close the open waters of Behring Sea, outside of the 100 miles, to navigation?

Sir Charles Russell. — I certainly most distinctly say that that was its effect, whatever the intention was : it was the assertion of a right to do it.

The language of M. de Poletica is distinct. He says :

We have a right to treat it as a shut sea; it fulfils all the conditions of a shut sea :

He was asserting that there was only an intention to exercise territorial jurisdiction 100 miles from the land, apparently ignorant of the fact that the assertion of 100 miles from the land would make Behring Sea a closed sea. There can be no question about it, I think. It was so treated by the King's Advocate : it was so treated by Lord Stowell, whose authority of course is great. Both these lawyers treated it as an assertion of territorial dominion practically closing Behring Sea, and assuming dominion over Behring Sea. In fact, M. Poletica's explanation is clear. He says : — That is the extent of our right, but we do not intend to exercise it beyond 100 miles from the shore.

The President. — The language of M. de Poletica, and of the Minister of Foreign Affairs, Count Nesselrode, which you read yesterday, is very significant upon the point — that Russia asserted a right which they did not intend perhaps, to exercise, or press ; but they asserted it, and were very eager in these Treaties not to bring into the discussion any question of principle.

Sir Charles Russell. — There is no other part of that letter which I think is important. There is however one letter I should like to call attention to in the United States correspondence relative to the English Treaty. It is on page 152 of Volume 1 of the Appendix to the United States Case. Mr Middleton is writing from St Petersburg, and he is giving his views of the Treaty, which he knows has just then been concluded between Great Britain and Russia. He says :

I have the honor to acquaint you that a convention was signed yesterday by the Russian and British Plenipotentiaries relative to navigation, fisheries, and commerce in the Great Ocean, and to territorial demarcation upon the northwest coast of America. In a conversation held this day with Mr Stratford Canning, I have learned this Treaty is modelled in a degree upon that which was signed by me in the month of April last, and that its provisions are as follows, to wit : —

The freedom of navigation and fishery throughout the great Ocean, and upon all its coasts ; the privilege of landing at all unoccupied points ; that of trading with the natives ; and the special privileges of reciprocal trade and navigation secured for 10 years upon the northwest coast of America, together with the mutual restrictions prohibiting the trading in fire arms.

And so on. There is the view which Mr Middleton expresses of the British Treaty.

Now let me emphasize this matter before I come to the Treaty itself, which, if it were not for the introduction of an enormous mass of collateral, and to a large extent irrelevant topics, I should, in the ordinary course, have gone to straight. But let me, before I come to the Treaty, briefly emphasize one or two points. It is, clear, first, that the United States, by the mouth of Mr Adams, traversed the whole claim set up by Russia : — We can admit no part of this claim. That claim was an assertion of territorial right from the Behring Strait, along the coast south to 55 degrees of north latitude.

The attitude of Great Britain on the other hand, is equally emphatic, I might almost say more emphatic, because they say again and again, —

There are two questions here involved — the question of territorial dominion on the mainland, and the assertion of territorial dominion on the sea : We regard the latter as the more important.

And what can be more emphatic than that note of the Duke of Wellington which I read yesterday, in which he says, in reference to the paper handed to him as an intended basis for negotiation : We cannot condescend to enter into negotiation upon the basis of a paper which claims this absurd pretension of jurisdiction 100 miles from the coast.

You recollect the memorandum I read yesterday.

We will not enter into a negociation until that is removed from the area of discussion.

Thereupon we have the intimation given that the orders to cruisers will be confined to the coast; that nothing will be done that will call for objection; that the orders given by Russia to its cruisers will limit the effect of the Ukase to the distance from the shore recognized by general international law; and upon that basis the question proceeds.

Now I come to the Treaty itself, making my final comment, if I may be permitted to do so, in the shape of a question. Supposing Russia had said : We intend to confine this treaty to the south of the Aleutians as far as freedom of navigation is concerned, but we do not intend to budge one inch from our assertions of claim of dominion and jurisdiction in Behring Sea — What would have been the result? Is there any member of the Tribunal who has any doubt that there would have been an end of the negotiations altogether, and the question never could have been settled at all on the lines of the Treaty, because the Duke of Wellington says : I will not treat a paper as the basis of the negotiations in which that pretension is put forward.

Now I come to the Treaty, which, as I said, in an ordinary case I should have come to hours ago. I refer for convenience to the print of that Treaty in the first volume of the United States Appendix, page 39. It begins by reciting that the Powers are desirous —

Consideration of
Treaty of 1825.

By means of an agreement which may settle upon the basis of reciprocal convenience the different points connected with the commerce navigation and fisheries of their subjects in the Pacific Ocean :

Without any limitation.

As well as the limits of their respective possessions on the northwest coast of America.

Again without any limitation.

I answer the suggestion that that went up to Yakutat Bay, at 59°30', by saying that there is no contemporaneous document in which any such limitation of the northwest coast is mentioned, while there are a great number — I have already read many of them, beginning with the Ukase itself — in which the northwest coast is described as beginning from Behring Straits and going down, according to the Russian claim, to 55° of north latitude.

Then it proceeds in Article I, in these words :

It is agreed that the respective subjects of the High Contracting Parties shall not be troubled or molested in any part of the ocean, commonly called the Pacific Ocean, either in navigating the same, in fishing therein, or in landing at such parts of the coast as shall not have been already occupied, in order to trade with the natives, under the restrictions and conditions specified in the following Articles.

Is there any one Member of the Tribunal in whose mind there is the slightest doubt that in this Treaty (which was a Treaty to cover the whole area of the dispute, in order to settle once and for ever the pretensions of the Ukase of 1821 with its assertion of jurisdiction) it was intended by the use of the words “ in any part of the Ocean commonly called the Pacific Ocean ”, to include Behring Sea? Is there the slightest doubt that it was not intended to exclude from that term “ Pacific Ocean ” a vast extent of sea measuring from north to south something like 1,400 miles and from east to west in its widest part something like 1,000 miles?

Now I go on to Article II, which says :

In order to prevent the right of navigating and fishing exercised upon the ocean by the Contracting Parties, from becoming the pretext for an illicit commerce, it is agreed that the subjects of His Britannic Majesty shall not land at any place where there may be a Russian establishment without the permission of the Governor or Commandant: and, on the other hand, that Russian subjects shall not land without permission at any British establishment on the north-west coast.

Then Article III, says :

The line of demarcation between the possessions of the High Contracting Parties upon the coast of the continent and the islands of America to the north-west, shall be drawn in the manner following.

I need not trouble the Tribunal to follow that line of demarcation, but the concluding words of the description are not unimportant. After describing the course of the line nearly up to the Arctic Ocean, the Article concludes with these words :

Shall form the limit between the Russian and British possessions on the continent of America to the north-west.

What does that mean except the north-west coast of America?

Then there is a stipulation as to the mode in which the inland boundary is to be drawn, namely, that it is not to exceed 10 marine leagues from the ocean, following the line of mountains where they do not exceed 10 marine leagues. Then it proceeds in Article V to say :

It is moreover agreed that no establishment shall be formed by either of the two parties within the limits assigned by the two preceding Articles to the possessions of the other; consequently British subjects shall not form any establishment

I call attention to this language——

either upon the coast or upon the border of the continent

that is the *lisière*——

comprised within the limits of the Russian possessions as designated in the two preceding Articles, and, in like manner no establishment shall be formed by Russian subjects beyond the said limits.

Then Article VI says :

It is understood that the subjects of this Britannic Majesty, from whatever quarter they may arrive, whether from the ocean or from the interior of the continent, shall for ever enjoy the right of navigating freely and without any hindrance whatever, all the rivers and streams which in their course towards the Pacific Ocean may cross the line of demarcation upon the line of coast described in Article III of the present Convention.

That clearly applies to the *lisière*; and it is a provision that, the crest of the mountains when they do not exceed 10 marine leagues from the coast being the dividing line, there is to be a right of navigation of rivers which would be the means of reaching the British possessions behind that 10-league strip, and therefore the stipulation is that for ever there shall be the right to navigate these rivers freely and without hindrance.

Now I go to Article VII. Article VI grants a perpetual right. Article VII is limited to a definite period. It says :

It is also understood that, for the space of ten years from the signature of the present Convention, the vessels of the two Powers, or those belonging to their respective subjects shall mutually be at liberty to frequent, without any hindrance whatever, all the inland seas, the gulfs, havens and creeks on the coasts mentioned in Article III, for the purposes of fishing and of trading with the natives.

Therefore under that Article there is for a limited period of time a right given (even as to waters which would be according to law territorial waters) of user of such waters, and that extends along the whole of the coast mentioned in Article III. Really I feel that I should be wrong in dwelling too long on this matter; but there are one or two other things to which I must call attention.

The Tribunal will ask the question:—What position after this Treaty, and before the concession to the United States, did Russia in fact assume? Because of course the conduct of Russia will throw light upon its view of its obligations and its rights so far as they were based on that Treaty, or so far as they are affected by that Treaty, or so far as they existed according to general law. For that purpose I will refer the Tribunal to the British Case, and I would begin, (although I do not intend to read it all) at page 77, which gives a history of the various records, so far as we have got them, of tradings, which, up to 1824-1825 unquestionably were almost entirely south of the Aleutian peninsula. But I pass on, and I ask the Tribunal to follow the position taken up by the United States in the first instance in 1840 in the case of the “Loriot”. This vessel undoubtedly was seized or inter-
Position assumed by United States in the case of “Loriot”.
ferred with in a position south of the Aleutians, and somewhere in the neighbourhood of Sitka. But we have got the views taken, at that time, by Mr Forsyth (who was then the Secretary of State), of the

effect of the Treaty of 1824. At page 80 an excerpt is given from a letter to Mr Dallas. It is in these words :

On the other hand, should there prove to be no Russian Establishments at the places mentioned, this outrage of the "Loriot" assumes a still graver aspect. It is a violation of the right of the citizens of the United States, immemorially exercised, and secured to them as well by the law of nations as by the stipulations of the 1st article of the convention of 1824, to fish in those seas and to resort to the coast, for the prosecution of their lawful commerce upon points not already occupied. As such it is the President's wish, that you should remonstrate in an earnest and respectful tone against this groundless assumption of the Russian Fur Company, and claim from His Imperial Majesty's Government for the owners of the brig "Loriot", for their losses and for the damages they have sustained, such indemnification as may, on an investigation of the case, be found to be justly due to them.

Mr Dallas himself, wrote on the 16th August in these terms :

The 1st article asserts for both countries general and permanent rights of navigation, fishing, and trading with the natives, upon points not occupied by either north or south of the agreed parallel of latitude———

without any limitation at all.

Then Mr Forsyth writes to Mr Dallas on the 3rd November, referring to the same Article. He says :

The 1st Article of that instrument is only declaratory of a right which the parties to it possessed under the law of nations, without conventional stipulations, to wit, to navigate and fish in the Ocean upon an unoccupied coast, and to resort to such coast for the purpose of trading with the natives.

.....
The United States, in agreeing not to form new establishments to the north of latitude of 54° 40' N., made no acknowledgment of the right of Russia to the territory above that line.

So far as the United States is concerned probably that may be correct; I do not stop to criticise that. Then he goes on :

It cannot follow that the United States ever intended to abandon the just right acknowledged by the 1st Article to belong to them under the law of nations — to frequent any part of the unoccupied coast of North America for the purpose of fishing or trading with the natives. All that the Convention admits is an inference of the right of Russia to acquire possession by settlement north of 54° 40' N. Until that actual possession is taken, the 1st Article of the Convention acknowledges the right of the United States to fish and trade as prior to its negotiation.

Then in his despatch of the 23rd February 1838, Count Nesselrode says :

It is true, indeed, the first Article of the Convention of 1824, to which the proprietors of the "Loriot" appeal, secures to the citizens of the United States entire liberty of navigation, in the Pacific Ocean, as well as the right of landing without disturbance upon all points on the northwest coast of America not already occupied, and to trade with the natives.

Again, Mr Dallas wrote to Count Nesselrode on the 5th (17th) March 1838, and in that he interprets the Convention as applying to any part of the Pacific Ocean. He says :

The right of the Citizens of the United States to navigate the Pacific Ocean, and

their right to trade with the aboriginal natives of the north-west coast of America, without the jurisdiction of other nations, are rights which constituted a part of their independence as soon as they declared it. They are rights founded in the law of nations enjoyed in common with all other independent sovereignties, and incapable of being abridged or extinguished except with their own consent.

Then he proceeds to argue the question; but I do not think I need trouble the Tribunal to read the whole of that, although I do not mean to suggest it is not important; but it looks like piling up a mass of argument upon a point which we have to submit is exceedingly clear.

Somewhere between 1835 and 1845 the whaling industry seems to have become very important. Whalers undoubtedly had penetrated to Behring Sea, and accordingly you will find at the bottom of page 83 this statement :

At this time—

that is in 1840 :

whalers were just beginning to resort to Behring Sea; from 1840 to 1842 a large part of the fleet was engaged in whaling on the “Kadiak Grounds”. Writing in 1842, Etholen says, that for some time he had been constantly receiving reports from various parts of the Colony of the appearance of American whalers in the neighborhood of the shores.

In the same year Etholen relieved Kuprianof as Governor at Sitka.

In 1841 the Charter of the Russian American Company was renewed for a further term of twenty years. Etholen reported the presence of fifty foreign whalers in Behring Sea.

I hope the importance of this is appreciated — whaling is one of the things expressly mentioned in the Ukase. There is no restriction in the Treaty to any kind of fishing; it is general and without qualification. Then at the bottom of page 83 you will find this :

In 1842, according to Etholen, thirty foreign whalers were in Behring Sea. He asks the Russian Government to send cruisers to preserve this sea as a *mare clausum*.

His efforts were, however, unsuccessful, the Minister for Foreign Affairs replying that the Treaty between Russia and the United States gave to American citizens the right to engage in fishing over the whole extent of the Pacific Ocean.

The reference to that is given.

Mr Justice Harlan. — Who is Etholen?

Sir Charles Russell. — He was at that time Governor of Alaska.

Then it proceeds :

In the same year, inland explorations by Zagoskin, which continued till 1844, began. Sir George Simpson, Governor of the Hudson's Bay Company, reached the Stikine post just in time to prevent an Indian uprising. He also visited the Russian establishment at Sitka, and completed an arrangement between the Companies to interdict trade in spirits on the coast.

Lord Hannen. — You were about, Sir Charles, to tell us where that statement is. I am referring to the bottom of page 83.

Sir Charles Russell. — It is in Bancroft's History of Alaska, page 583.

Lord Hannen. — I mean the sentence with reference to the Minister for Foreign Affairs.

Sir Charles Russell. — That will be found in the citations lower down.

Lord Hannen. — That is what I want to get.

Sir Charles Russell. — It is in Bancroft, who is an American author, as probably you are aware. Then it goes on to say :

About this time the Russian American Company became alarmed at the danger to their fur trade. Every effort was, therefore, put forward by the Company and the Governors to induce the Foreign Office of the Russian Government to drive off these whalers from the coasts, and by excluding them for a great distance from shore prevent trespasses on shore and the traffic in furs.

At this time pelagic sealing, although it is admitted to have been carried on from time immemorial — I mean from the coasts, by the natives — probably, had not assumed very large proportions; and apparently the American subjects and the British subjects, and others, were doing what, at another period, the Americans had done in the Falkland Islands, namely, making descents on the islands themselves, and taking seals in that way, which they had no right from any point of view to do; and accordingly the suggestion is here made, that in order to prevent raids the Russian Government should authorize the driving of these whalers off the coasts.

Then it proceeds to say :

In 1843 explorations were carried out by the Russian on the Sustchina and Copper Rivers.

The whalers from 1843 to 1850 landed on the Aleutian and Kurile Islands committing depredations. United States' captains openly carried on a traffic in furs with the natives. Tikhmenieff writes, From 1843 to 1850 there were constant complaints by the Company of the increasing boldness of the whalers.

This is an extract from a historical review of the formation of the Russian American Company and their proceedings, written by Tikhmenieff, a Russian chronicler. It is referred to on page 40 of volume 1 of the Appendix to the British Case.

I am also reminded in this connection that the United States Counter Case, on page 24, refers to this enumeration of historical facts by us, and says :

Later, however, especially in the years following 1840, Behring Sea was actually visited, as pointed out at pages 83 to 90 of the British Case, by numerous vessels, mostly whalers.

Of course, the point of this is to see what, if anything, Russia did. That is the point which I am now coming to. I now read from page 84 of the British Case.

In 1846 the Governor General of Eastern Siberia asked that foreign whalers should not be allowed to come within 40 Italian miles of the Russian shores.

Tikhmenieff thus describes the result of these representations :

The exact words of the letter from the Foreign office are as follows :

The fixing of a line at sea within which foreign vessels should be prohibited from whaling off our shores would not be in accordance with the spirit of the Convention of 1824, and would be contrary to the provisions of our Convention of 1825 with Great Britain. Moreover, the adoption of such a measure, without preliminary negotiation and arrangement with the other Powers, might lead to protests, since no clear and uniform agreement has yet been arrived at among nations in regard to the limit of jurisdiction at sea.

In 1847 a representation from Governor Tebenkof in regard to new aggressions on the part of the whalers gave rise to further correspondence. Sometime before, in June 1846, the Governor General of Eastern Siberia had expressed his opinion that, in order to limit the whaling operations of foreigners, it would be fair to forbid them to come within 40 Italian miles of our shores, the ports of Petropaulovsk and Okhotsk to be excluded, and a payment of 100 silver roubles to be demanded at those ports from every vessel for the right of whaling. He recommended that a ship of war should be employed as a cruiser to watch foreign vessels.

Now there is a distinct claim addressed to the Government for protection. This is the answer :

The Foreign Office expressly stated as follows in reply :

This is again a textual quotation.

We have no right to exclude foreign ships from that part of the Great Ocean which separates the eastern shore of Siberia from the north western shore of America, or to make the payment of a sum of money a condition to allowing them to take whales.

What was that sea which is part of the Great Ocean unless it was the Behring Sea — that part of the Great Ocean which separates the eastern shore of Siberia from the north-western shore of America? May I call the attention of the Tribunal to the map? What is the sea that separates Siberia, on the one hand, from the north-west coast of America on the other, unless it is the Behring Sea; and what is the Great Ocean of which that intervening sea is described as part unless it is the great South Sea, or the Pacific Ocean? The language is indubitable and unmistakable.

Tikhmenieff continues,

The Foreign Office were of opinion that the fixing of the line referred to above would re-open the discussions formerly carried on between England and France on the subject. The limit of a cannon-shot, that is, about three Italian miles, would alone give rise to no dispute. The Foreign Office observed, in conclusion, that no Power had yet succeeded in limiting the freedom of fishing in open seas,

that is literally, historically true;

and that such pretensions had never been recognized by the other Powers. They were confident that the fitting out of colonial cruisers would put an end to all difficulties; there had not yet been time to test the efficacy of this measure.

That is with reference to preventing raiding upon the islands and coasts. Then there is another statement there with further details, bringing it down to a later period.

The President. — Is the authority of this official gentleman acknowledged by the other party?

Sir Charles Russell. — Yes, I thought I read a moment ago a passage in which, referring to the very pages I am reading from (pages 83 to 90) — the United States referred to these quotations in our Case.

The President. — I mean the quotations from the Russian official documents?

Sir Charles Russell. — Yes, I thought the Tribunal would have appreciated my reference. I referred to page 24 of their Counter-Case, in which, referring to the very passages I have been reading, they make this comment

Later, however, especially in the years following 1840, Behring Sea was actually visited, as pointed out at pages 83 to 90 of the British Case, by numerous vessels, mostly whalers, but it is shown by Bancroft, the author so frequently quoted by the British Government, that the whaling industry was not for the Russians a profitable one.

And this is their comment :

General Foster. — Would it be convenient for you to read page 255.

Sir Charles Russell. — I will, if you like.

General Foster. — I should be glad if you would, in view of the President's enquiry, because it shows that we contradict distinctly the quotations, made.

Sir Charles Russell. — I will read it if you wish. It says here :

But it is shown by Bancroft, the author so frequently quoted by the British Government, that the whaling industry was not, for the Russians, a profitable one, and there appears to have been no motive for protecting that industry by the imperial Ukase of the colonial government.

That is all the comment that is made so far. Then it goes on :

Bancroft is also referred to in the British Case (pp. 83 and 84) to show that in 1842 the Russian Government refused Etholin's request that Behring Sea be protected against invasions of foreign whalers, on the ground that the Treaty of 1824 between Russia and the United States gave to American citizens the right to engage in fishing over the whole extent of the Pacific Ocean. From what is said, however, by this same author immediately following the above citation, it appears that, through the endeavours of Etholin the Government at length referred the matter to a committee composed of officials of the navy department, who reported that the cost of fitting out a cruiser for the protection of Behring Sea against foreign whalers would be 200 000 roubles in silver, and the cost of maintaining such a craft 85 000 roubles a year. To this a recommendation was added that, if the company were willing to assume the expenditure, a cruiser should at once be placed at their disposal. Hence, according to Bancroft, the failure to protect Behring Sea can not be traced to the fact that the Russian Government considered it had lost the right to do so by the treaties of 1824 and 1825.

General Foster. — It is a question of money, not of right.

Sir Charles Russell. — Could any thing be more absurd than this comment, which is gravely referred to as a comment impugning the accuracy of the excerpts from these official accounts? Where is the suggestion that these accounts are not accurate? What there is here is a suggestion that the failure to protect Russian rights was owing to the fact

that it would be too expensive to do it. That is the only suggestion that is made on this page.

General Foster. — Bancroft says so.

Sir Charles Russell. — If he said so, it is cited in your case.

General Foster. — Quoting from your own author.

Sir Charles Russell. — I think there must be a limit to these interruptions. I have gratified you so far, and have been pleased to be able to gratify you, because it is a strong point in favour of what I have been addressing the Tribunal upon. I have read the pages from the letters of the Foreign Minister in which he said : We have no right to do it : it will re-open the question between the British Government and the Government of America if we attempt to do it.

The President. — Is that all, General Foster, you wish to be read from the Counter-Case under the present circumstances ?

General Foster. — As it appears the interruption is unwelcome, we will reserve it.

Sir Charles Russell. — I assure you, it is not unwelcome — my friend is quite wrong. If I am reading anything, and there is anything else which explains its meaning or puts a different meaning on it, I shall always be willing to read it; but really to make this a foundation for stating that the United States had impugned the accuracy of our quotations, I must say, is absurd.

General Foster. — If I understood Counsel just now to remark that he has read an authoritative declaration from the Russian Minister I misunderstood him ; I understood that he read it from a historian.

The President. — That is quoted from the Foreign Office. It is in inverted commas.

Sir Charles Russell. — I beg General Foster's pardon. It may be my fault, but I thought I read " Tikhmenieff thus describes the result of these representations " ; and then he proceeds to say : " The exact words of the letter from the Foreign Office were as follows ". Then the words are given in inverted commas. Then on the next page — I have no doubt I was not expressing myself with sufficient clearness — he goes on in inverted commas to say " The Foreign Office expressly stated as follows in reply :

We have no right to exclude foreign ships from that part of the Great Ocean which separates the eastern shore of Siberia from the north-western shore of America, or to make the payment of a sum of money a condition to allowing them to take whales. "

Lord Hannen. — Have you got " Bancroft " here? I do not mean in the room, but for reference.

Sir Charles Russell. — We have. It is quite available, and I can send for it at any moment.

Now, I am loth to make a reference to a subject not pleasant to either of us, and I will content myself with saying that certain of those falsified documents relate to the period after the Treaties, and consist, in

large part, of interpolations suggesting that there had been interference by Russia, which would have been inconsistent with its true action as we now know it to be. I content myself with saying that. They begin at page 60 of the original Case, and go on. I do not enlarge upon it.

Then there is one other thing I must say in this connection, and I think it brings this matter practically to a conclusion. After the Ukase of 1821, there were two confirmatory Charters granted to the Russian-American Company, and the significant change in the language of those Charters, compared with the original Charter under the Ukase of 1821, is itself significant and conclusive upon the point upon which I am addressing you.

In order that this point may be appreciated, let me invite your attention to volume I of the United States' Appendix, at page 16, to look at what the terms of the original Ukase were.

The pursuits of commerce, whaling, and fishery, and of all other industry on all islands, ports, and gulfs, including the whole of the northwest coast of America, beginning from Behring Straits to the 51° of northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring's Straits to the South cape of the Island of Urup, namely, to the 45°50' northern latitude, in exclusively granted to Russian subjects.

That is the 4th of September, 1821. There are provisions, as you will recollect, for the confiscation of vessels that come within the limits there set out. The Charter of 1821 is on page 24, and it concedes to the Company the privilege of hunting and fishing, to the exclusion of all other Russian or foreign subjects, throughout the territories long since in the possession of Russia, and then it describes the extent of those territories in much the same language. Now, if you turn to page 27, you will find the document at the bottom of that page headed, "Confirmation of Charter of 1821". This confirmation was, in fact, published by the Senate on March 29th (April 10th) 1829, five years after the Treaty with the United States, and four years after the Treaty with Great Britain. If Russia was acting, as we assume she was, in good faith in the matter, you would expect to see a recognition of these Treaties, and of the fact of limiting the rights which could be properly granted to the different subjects, and, accordingly, you do find it on page 28.

The limits of navigation and industry of the Company are determined by the treaties concluded with the United States of America 5 (17), 1824, and with England February, 16 (18), 1825.

In all the places allotted to Russia by these Treaties there shall be reserved to the Company the right to profit by all the fur and fish industries, to the exclusion of all other Russian subjects.

You see the change at once. Then comes Article VII.

All the articles of these rules and of the privileges published together with them, which are not limited by the aforesaid Treaties, and which are not contrary to the Ukase of October 14th, 1827, concerning outrance into service, shall remain in full force.

Therefore, it is the clearest recognition that they had no longer the

right to exclude foreigners from the pursuit of fishing, because the power in the first was exclusive of all other Russian and of all foreign subjects. In the confirmatory Charter of 1829, it is Russian subjects only; and the powers granted to Russian subjects are to be determined and limited by the effect of those Treaties.

Mr Justice Harlan. — Do you construe that to mean that Russia intended foreign subjects to profit in the fur and fish industries which would otherwise belong to Russia?

Sir Charles Russell. — No; I have said nothing that would bear that meaning. In the Treaty, so far as there were exclusive rights given, of course, she had a right to deal with them; but I deal with the one point only, and do not want to be led away to others, of the recognition of the right of the subjects of Great Britain and of the United States to fish in the Behring Sea; that under the terms of the Charter of 1821, six days after the date of the Ukase, in the whole area, embracing and including Behring Sea, there was an exclusion of all foreign subjects and of all Russian subjects; but, in the confirmatory Charter of 1829, there is the omission of the exclusion, as far as the Treaty affects the area, of foreign subjects altogether.

Mr Justice Harlan. — I think I ought to say that I have no desire to lead Counsel to other subjects; my only wish was to follow out the matter to which he referred, as I supposed.

Lord Hannen. — And I am bound to say I have the same difficulty as Mr Justice Harlan. That is plainly confined to the exclusion of all Russian subjects in places allotted to Russia.

Sir Charles Russell. — Clearly.

The President. — The ten-year clause, I suppose.

Sir Charles Russell. — Yes. May I respectfully beg Mr Justice Harlan's pardon; I am sure I did not mean to convey that I did not desire the question to be put. I thought I had made my meaning clear.

So in the Confirmatory Charter of 1844, on page 28, dated the 10th of October, 1844, Article II says. —

The limits of the navigation and trade of the Company on the shore of the Continent and on the Islands of Northwestern America", —————

and it repeats the course of the line of demarcation in the Treaty between Great Britain and Russia; and then, in section 3, it provides :

In all places annexed to Russia by the above-mentioned delimitation there is granted to the Company the right to carry on the fur and fishing industries to the exclusion of all Russian subjects.

I do not think there is anything else in that which it is important to draw attention to.

Now, I have practically dealt with both branches of Article I. The Tribunal will observe that it contains two divisions: first, what exclusive jurisdiction in the sea known as Behring Sea did Russia assert and exer-

cise, and what exclusive rights in the seal-fisheries did Russia assert and exercise? I have incidentally, of course, addressed myself to both questions. I want to say, one word, however, about the question of the exclusive right in the seal fisheries.

Mr Justice Harlan. — Before you go to that, Sir Charles, let me make one enquiry so that I may get your view fully.

We are required in the first question to answer what exclusive jurisdiction Russia asserted and exercised. If I remember rightly, both M. de Poletica in his letter to Mr Adams, and Baron Nicolay in his letter to Lord Londonderry or Count Lieven, said that Russia, if it deemed proper, could declare the whole of the Ocean, the Pacific Ocean, *mare clausum*; but they did not intend by such Ukase to assert any such right, but only limited their declaration to particular localities. Now, do you contend that in answering that question we should regard this announcement of Russia of its right, if it thought proper, to exercise this exclusive jurisdiction over these waters, as an assertion within the meaning of the Treaty?

Sir Charles Russell. — Certainly, an assertion.

Lord Hannen. — But not an exercise?

Sir Charles Russell. — But not an exercise. I will formulate in precise language what we submit ought to be the answers to each of these four questions.

I was saying a word about what exclusive rights in the seal-fisheries did Russia assert and exercise. Upon this there does not seem to be any

Nature of the exclusive right in the seal fisheries exercised by Russia.

room for question. Russia was the territorial owner of the Pribilof Islands. Russia exercised the rights of territorial ownership upon those Islands, and had the rights,

whether she exercised them or not I know not and care not, but the right to exercise them exclusively of all other persons and Powers, not only on the Islands, but within 3 miles of the coast of the Islands. There is no suggestion that Russia, as regards the seal fisheries, made at any time any assertion greater than or different from the assertion which she would be justified in making as territorial owner. I find none. My learned friends would answer that, and, as I conceive, quite rightly, by saying that there was no need for her to assert any right outside, because pelagic sealing had not got to such dimensions as to call for her interference. That I do not propose to deal with at this stage of the argument at all, because it would embrace the more wide and general question of what right she could have asserted in point of fact, which is not the point touched by question 1. It is not the question of what right she had in fact, it is what right she asserted and exercised. I will consider whether she could have any right. Of course, the Tribunal knows I assert that she could not, except the rights that belong to her as territorial owner, — rights *ratione soli*; the exclusive right to take what was upon her territory, the right to exclude anybody else from that territory; and a similar right extending to the maritime belt of 3 miles beyond her territory.

Senator Morgan. — As to that marginal belt, I understood you to say a moment ago that Russia at that time said that the Nations had not agreed to the 3-mile limit as a matter of international law.

Sir Charles Russell. — In order that the Tribunal may follow this exactly, I will repeat the question that you, Sir, have been good enough to address to me in relation to my limitation of the 3-miles on the coast : you suggest to me that, in one of the communications from Russia, it had been stated that the 3-mile marginal belt was not then determined, or fixed or universally agreed upon limit of territorial waters.

I think there is truth in that suggestion. It was, to a greater or less extent, indeterminate. It was I think generally fixed at the length to which cannon-shot could be carried, and that may have varied more or less ; but it is quite true to say that at that time it was not quite clearly fixed, whether it was 3 miles, or 4 miles, or 5 miles, but beyond that there was no difference. There was a certain marginal belt, the precise limit of which has in later years come to be recognized at 3 miles, or a marine league.

The President. — It has no relation to our subject, and perhaps it would be better not to press that question too tightly even to-day.

Sir Charles Russell. — No, because as the power of arms is increased, it may be the application of that principle *terræ dominium finitur ubi finitur armorum vis* may receive a greater expansion. It is not a question, I would venture to say, that need trouble us. It is admitted that there is a marginal belt which to-day may be indeterminate, but indeterminate only within narrow and confined limits.

Senator Morgan. — Then, I take it, it was entirely indefinite how far Russia claimed at that time jurisdiction in a territorial sense in Behring Sea.

Sir Charles Russell. — Do you mean before or after the Ukase?

Senator Morgan. — At that time.

Sir Charles Russell. — There is a great difference. It is clear that by the Ukase if that had been persisted in she claimed territorial jurisdiction over the whole of Behring Sea. As I have pointed out she was insisting on 100 miles from the land, which 100 miles from the land would have shut Behring Sea and made it a *mare clausum*.

Mr Justice Harlan. — May not that throw some light on the fact, which struck me in the correspondence, that Mr Canning did not at any time mention the Behring Sea or the Sea of Kamschatka, but seemed to have constantly in his mind keeping open Behring Straits, because if the 100-mile limit was enforced that would close Behring Strait. Of course he must have proceeded on the ground that Russia disclaimed any purpose of keeping foreign vessels out of the open waters of Behring Sea. They could not get out to the Arctic Ocean unless Behring Straits were open.

Sir Charles Russell. — With deference that is not what the correspondence shews, because the question of Behring Straits being closed

comes up in relation to a different subject — the access to the Arctic Ocean beyond it.

Mr Justice Harlan. — Mr Canning said — We cannot get to the Arctic Ocean with vessels of discovery unless we go through Behring straits.

Sir Charles Russell. — True he uses the reference in a very significant way. He says the Power that could propose to itself the notion of treating the Pacific Ocean as *mare clausum* might think it right to close Behring Straits, which is only 48 miles wide. That the Ukase involved the assertion of territorial dominion over Behring Sea is made apparent also by the statement of M. Poletica justifying the Ukase on the ground that they were entitled to treat it as a *mare clausum*, *mer fermée*, but they did not intend to push their rights to that length, losing sight of the fact that pushing their rights of sovereignty to 100 miles from the coast did, it was insisted on, effectually close Behring Sea if. And that that was a claim of territorial sovereignty is clear from the opinion of the King's Advocate, which I read, and also the more important opinion of Lord Stowell, that a right to prevent people coming over any land covered by water is necessarily an assertion of territorial dominion over that water.

Mr Justice Harlan. — The language of Lord Stowell is, the territories claimed are of different species, islands, portions of the Continent, and large portions of the sea adjoining.

Sir Charles Russell. — Quite right, Sir, and Behring Sea would be a very large portion of the sea adjoining, and that would make the point stronger. He was regarding it as 100 miles from the coast. He says that is territorial jurisdiction over 100 miles from the coast.

Mr Justice Harlan. — I do not say you are not right; I only wanted to see what your view was.

Sir Charles Russell. — I do not think it could be contended by the other side that, if a Power asserts an exclusive right to possession of a certain area of land covered by water, and says, we have the right to exclude anybody else from coming in that area, that that is anything but an assertion of territorial jurisdiction over that area.

Mr Carter. — My argument was distinctly the other way.

Sir Charles Russell. — I confess, it astonishes me to hear it.

Mr Carter. — I only seek to correct a misapprehension.

The President. — And of course it is correct for Counsel to acknowledge that they did not argue the point in that way. I think they stand on the same ground as you do. They do not argue the point of jurisdiction as to the first question. [*To Mr Carter*] I do not understand in your argument you called upon us to decide that the rights claimed or exercised by Russia were rights of territorial jurisdiction.

Mr Carter. — We do not. The interpretation that I put in my argument on the Ukase was that it was not an assertion of territorial dominion over the sea, but a mere assertion of a right to protect a shore industry by protective measures stretching over the sea.

Sir Charles Russell. — Then we agree as to the first question.

The President. — It is a relief to us to believe you do. You do not deny historically, that is as a point of history, that Russia asserted these territorial rights of jurisdiction, which, upon my impression at first sight (though I do not express any definite opinion of my own) according to the despatches of M. de Poletica and Baron Nicolay and Count Nesselrode, seem to be expressly reserved by Russia.

Mr Carter. — I do not quite understand the suggestion of the learned President.

The President. — In the diplomatic despatches of M. de Poletica and Baron Nicolay and of Count Nesselrode, the Minister of Foreign Affairs, the Russians declared that they might have the right of considering the sea between the two coasts of Asia and America, that is to say, not only Behring Sea but a great portion of the North Pacific Ocean, as being a *mare clausum*; that is to say, a sea on which they have the rights of territorial sovereignty. I say you did not touch that point in your argument.

Mr Carter. — I said in reference to that, that while they declared that they might have asserted that right, they expressly declared, or what I understood as expressly declared, that they did not intend to assert it; that the measure was designed as a preventive one. That is to say, it was as I understood it for the purpose of protecting a shore industry; that they did not intend to assert territorial dominion over Behring Sea, although they said they might assert it.

The President. — That they might assert it if they chose to do so?

Mr Carter. — If they chose to do so; but that they did not choose to assert it by the Ukase.

The President. — There is some doubt as to the use of the word “assert”. I think you use the word “assert” in a different meaning from what Sir Charles does.

Mr Carter. — They said they might assert it, and assert it rightfully. There is no doubt about that.

The President. — They did not mean to exercise it?

Mr Carter. — They did not mean even to assert it.

Sir Charles Russell. — Mr President, there is a latent ambiguity in my friend's statement which must be cleared up. I began, in order to avoid that ambiguity, by giving to this Tribunal what I conceived to be the meaning of that first question, in order to show that when “right” and “exclusive jurisdiction” were there referred to, it did not mean the general inherent right which a nation has to protect its property or its interests, which I will discuss hereafter, but that the question was pointed to whether Russia had asserted and exercised territorial jurisdiction.

Let me recur to that point, which I now see I was quite right in endeavouring to make clear at the beginning of the discussion. I pointed out that a right of defence of property or interest was not an exclusive right. The word in the question is “exclusive”. I pointed out further that still less was it an exclusive right of jurisdiction in a defined area, because

I pointed out that a right of defence or protection of property or interest knew no circumscription of space except where the property to be defended was, where the interest to be defended was. I was not then discussing whether there were the rights which my learned friend professes exist in that regard. I was assuming them for the moment. Thereupon I proceeded to point out, and I hope established, that what the question meant was whether Russia had or had not asserted a sovereign authority exclusive of all other persons, and in a defined and definite area, namely, Behring Sea; and I made that out — at least I thought I made it out — by saying that the case of the United States had been built up on that theory by the use, amongst other things, of these documents which have proved to be unreliable. I made that out by showing the legislative enactments of the United States Congress, based upon its derivative title. I further made that out by the mode in which they have invoked that municipal authority, as a municipal authority exercisable in a definite area. And finally I made that out by the libel in the Court; by the argument of their counsel; by the argument before the Supreme Court at Washington, and by the appreciation of that argument and position as expressed by the Judges of that High Court.

The President. — That is perhaps more of historical than of practical interest to the question which is laid before us.

Sir Charles Russell. — I think myself it is important, as I take the liberty of saying, because of its far-reaching consequences. My argument has been, from first to last, that every one of these assertions up to the time we came into Court — practically every one of these assertions — is based on the territorial claim of the United States : question five as well as questions one, two, three, and four. But I do not wish to anticipate. The point I am upon is this : you have, with great deference, to answer the question in the sense in which you understand that question; and the sense in which that question is to be understood, I am respectfully submitting, is that the Tribunal is asked to say whether Russia asserted and exercised — and I repeat my words, asserted and exercised — territorial or sovereign authority, exclusive of all other persons, in the Behring Sea. That is the question to which you have to make your answer.

The President. — Certainly; one of the questions.

Sir Charles Russell. — As to the question of exclusive rights in the seal fisheries, I have already dealt with that, and I cannot see that there is much room for discussion or difference between us. There is no suggestion that Russia either asserted or exercised any rights in relation to seal fisheries other than those that belonged to her, *ratione soli*, as owner of the Pribilof Islands.

Mr Justice Harlan. — The difference between counsel, then, in respect to this finding, I understand to be this : You assert that Russia, in these different ways you have pointed out, did assert, within the meaning of that question, exclusive jurisdiction in the whole of Behring Sea by this

Ukase. On the other side, it is contended that Russia did not assert such exclusive jurisdiction by that Ukase, but expressly disclaimed a purpose to assert it.

Sir Charles Russell. — So I understand. But again, Judge, with great deference, that statement illumines the point with which the Tribunal must still deal, as to what is the meaning of the question.

Mr Justice Harlan. — I understand that.

Sir Charles Russell. — And my point is — and I submit I have demonstrated it — that when “exclusive jurisdiction” is spoken of, it means exclusive jurisdiction in Behring Sea; and an exclusive jurisdiction in Behring Sea means exclusive jurisdiction in a particular and defined area; and that exclusive jurisdiction in a particular and defined area means territorial or sovereign jurisdiction, and nothing else. Of course if I am to argue the question again as to what the Ukase meant, I should have to go over the ground with which you are very familiar.

Mr Justice Harlan. — I think we all understood your argument.

Sir Charles Russell. — That I am not going to do; but how it can be contended that when it is stated in the Ukase of 1821,

the pursuits of commerce, whaling and fishery, and of all other industry on all islands, ports and gulfs, including the whole of the northwest coast of Americal beginning from Behring Straits to the 51st degree of Northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring Strait to the South Cape of the Island of Urup, viz, to the 45 degree 50 minutes northern latitude, is exclusively granted to Russian subjects : —

and when in furtherance of that exclusive grant it is prohibited to all foreign vessels to approach within less than one hundred Italian miles, subject to confiscation : —

How those two, taken together, can be anything less than, or different from, an assertion of territorial sovereignty, with a sanction to support that territorial sovereignty, passes my comprehension. And that was the case originally made by the United States. I will leave the subject by citing one more passage from their Case, page 69. This makes it apparent, unless I am greatly mistaken. It is near the top of page 69 :

From the foregoing historical review it appears :

First. That prior and up to the date of the Treaties of 1824 and 1825, Russia did assert and exercise exclusive rights of commerce, hunting and fishing, on the shores and in all the waters of Behring Sea.

Second. That the body of water known as Behring Sea was not included in the phrase “Pacific Ocean” as used in the Treaty of 1825.

What does that mean? It means that there was nothing in those Treaties which interfered with Russia’s assertion and exercise of exclusive rights in Behring Sea mentioned in paragraph one.

Third. That after said Treaty of 1825, the Russian Government continued to exercise exclusive jurisdiction over the whole of Behring Sea up to the time of the cession of Alaska, in so far as was necessary to preserve to the Russian-American Company the monopoly of the fur-seal industry, and to prohibit the taking on the land or in the

water by any other persons or companies the fur-seals resorting to the Pribilof Islands.

As I have pointed out, there is not a trace of evidence which relates to the question so far as fur-seals are concerned.

But here again my learned friend Mr Carter, as I respectfully think, is confusing the motive of this attempted legislation by Russia with the effect. The motive may have been to protect this, that or the other; but the fact was that it asserted territorial sovereignty.

I will bring out my meaning, in concluding this branch of the question, by formulating precisely the answers which I submit the Tribunal ought to give to these four questions. They are formulated with some care and at length at page 26 of our printed Argument :

The foregoing facts and arguments, it is submitted, conclusively establish that the following answers should be given to the first four questions in article 6 of the Treaty of Arbitration.

To question one. That Russia exercised no exclusive jurisdiction in Behring Sea prior to 1867; that in 1821 only, Russia asserted exclusive jurisdiction over a part of Behring Sea along its coasts, but that she withdrew the assertion, and never afterwards asserted or exercised such jurisdiction.

Mr Justice Harlan. — What do you mean by the phrase there, “ over a part of Behring Sea ”?

Sir Charles Russell. — That is the hundred miles which is mentioned in the Ukase. We might have treated M. Poletica's letter as an assertion of authority over the whole of Behring Sea, and I think we should have been well founded in doing so; but we preferred to take the legislative act, which speaks of one hundred miles.

Mr Justice Harlan. — I do not understand that answer to include the idea that Russia asserted exclusive jurisdiction over the whole of Behring Sea by the Ukase of 1821.

Sir Charles Russell. — I do not think it necessarily means that. What the framers of these answers have done is this : They might according to the statement of M. de Poletica, or according to the effect of the Ukase, perhaps have been justified in adopting the claim of dominion over the whole of Behring Sea; but what they have been content with doing was to rely upon the legislative act itself, the Ukase : and as the Ukase made the limit of 100 miles, to state that in the terms of the Ukase itself. I say therefore that this is literally the correct answer to question one :

That in 1821 only Russia asserted exclusive jurisdiction over a part of Behring Sea along its coasts, but that she withdrew the assertion, and never afterwards asserted or exercised such jurisdiction.

That Russia exercised no exclusive rights in the seal fisheries in Behring Sea prior to 1867; that in 1821 only. Russia claimed exclusive rights, as included in her claim of jurisdiction extending to 100 miles from the coast, but that she withdrew the assertion and never afterwards asserted or exercised such rights. The only exclusive right which Russia subsequently exercised was the right incidental to her territorial ownership.

To question two. That Great Britain neither recognized nor conceded any claims by Russia of jurisdiction as to the seal fisheries, i. e., either (a) of exclusive

jurisdiction in Behring Sea, or (b) exclusive rights in the fisheries in Behring Sea, save as already mentioned.

That is to say, saving the rights incidental to territorial ownership.

To question three. That Behring Sea was included in « Pacific Ocean » in the Treaty of 1825; that Russia neither held nor exclusively exercised any rights in Behring Sea after the Treaty of 1825, save only such territorial rights as were allowed to her by international law.

To question four. That no rights as to jurisdiction or as to the seal fisheries in Behring Sea east of the water boundary in the Treaty between the United States and Russia of the 30th March 1867, passed to the United States under that Treaty, except such as were incidental to the islands and other territory ceded.

Those are the answers which we say we have by the argument that I have submitted established as the correct answers to be given to each to these four questions.

Senator Morgan. — There are seven or eight answers there to four questions, as I understand it.

Sir Charles Russell. — As a matter of fact there are four answers to four questions. There is the precise number of answers to the precise number of questions.

Now, sir, I have, I am happy to say, got to the end of that; and I really feel—or I did feel until my friend's interposition—that I ought to offer an apology for taking so long to demonstrate what we humbly submit is very easily made clear.

The President. — We will come next to the fifth question.

Sir Charles Russell. — Yes, Sir.

The Tribunal here adjourned for a short time.

THE FIFTH QUESTION

Sir Charles Russell. — Mr President, I now proceed to address myself to the consideration of what the answer of the Tribunal ought to be to the 5th question of Article VI; and in order to assist the Tribunal in formulating that answer, it is obviously necessary, in the first place, as I have thought it necessary in the case of the first four questions, to endeavour to fix what is the meaning of the question itself, because, unless the question itself is clearly understood, it cannot be seen what is the proper and definite answer to the question. Now, in order to convey to the Tribunal the meaning which I submit is the correct one, I have to call your attention to what I understand to be the general suggestion or meaning put upon it by my learned friends on the other side, and I wish to state to the Tribunal how I propose to deal with the matter. I propose in the first place to state and to justify, if I can, the meaning which I attach to the question.

I cannot, of course, venture to assume that that is the construction

which the Tribunal will attach to it; and, therefore, I shall proceed to consider what ought to be the answer assuming that my construction is wrong, and that put by the other side is right. Now, speaking broadly, the construction put by the other side is this, that the Tribunal is asked to say what right of protection or of property of any kind the United States possesses in respect to seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit. They put their interpretation in various ways: first, what right is there in the individual fur-seal? although they say it is not necessary for them to put the right so high as that: secondly, if they have not property in the individual fur-seal, what right of property is there in what they are pleased to call the fur-seal herd? and, again, they say it may not be necessary to put it even so high as that. And, finally, if they have no property in the individual seal, nor any property in the herd, what right in the nature of a property right is there in the industry carried on by means of the fur-seals upon the Pribilof Islands? They say that in one way or other of those three forms question 5 is addressed to the question of property: either in seals, in the herd, or in the industry; and that the right of protection there referred to is such right of protection as a nation may exercise, according to international law, in defence of its property in the seals, or in the herd, or in the industry founded upon them.

Now I think I have stated correctly the various modes in which their suggestions are made. I shall consider those, and assume that they are right in their construction of the meaning of the question, but I have first to say that I dissent entirely from that as being the meaning of the question. I dissent from the suggestion that it is either the right of property or the right of protection that is intended to be covered by that fifth question. Then I shall be asked, and properly asked, what is my construction of that question? Does it mean property and right of protection in the fur-seals frequenting the Behring Sea wherever those fur-seals are to be found? I say, no. It is a question just like Questions 1, 2, 3, and 4, at the bottom of which is the assertion of exclusive jurisdiction; and, therefore (I am now indicating the point, not arguing it: I will justify it presently), that as the main volume and strength of their

Question raised by
question 5 is one of
exclusive jurisdiction
in Behring sea.

case was presented and is presented in the correspondence, the property right indicated in Question 5 is the exclusive right to take fur-seals in the Behring Sea; that is to say, a property right of an exclusive character in the fishery in the Behring Sea and not in the seals either as individuals or as a herd, — in other words, an exclusive right to take fur-seals in Behring Sea, to prevent anyone else taking them in Behring Sea, — in other words, the assertion of a property right of an exclusive character in the fishery in Behring Sea, and not in the individual seals or in the herd.

How is this position made clear? In the first instance, the reference in the opening words of Article VII shew that the framers of the Treaty

designed to treat article V, like the preceding questions, as a question of exclusive jurisdiction, because the words of article VII are :

If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary :

Then the question of Regulations is to arise ; and it is not argued, it could not be argued, therefore, that question 5, as it stands in this Treaty, was not intended to raise a question of exclusive jurisdiction. That exclusive jurisdiction would be the exercise of the right to which I have already adverted, the exclusive right to take the seals in the Behring Sea and, accompanying that right and in protection of that right, exclusive jurisdiction in the eastern part of Behring Sea, for the protection of that right.

Now, how is that made apparent ? I have referred to the language of Article VII ; I have now to refer to the 5th article of the *Modus Vivendi* of 1892. That Article deals with what is to be the effect on the question of compensation should the right of Great Britain be affirmed, or should the right of Great Britain to take seals be negatived.

Senator Morgan. — You mean British subjects ; not the Government of Great Britain ?

Sir Charles Russell. — Yes, certainly ; I mean British subjects, because it runs thus — If the result of the Arbitration be to affirm the right of British sealers to take seals in the Behring Sea within the bounds claimed by the United States, that is the eastern part of Behring Sea under its purchase from Russia, then compensation is to be made by the United States ; if, on the other hand, the result of the Arbitration is to deny the right of British sealers to take seals within the said waters, then compensation is to be made by Great Britain to the United States.

And I point out that if question 5 was intended to touch or to raise a question of property in the individual seals, or in the herd of seals as they have been called, or in the industry founded on those seals, the limitation as to compensation could not have been restricted to the mere question of the right to take seals in Behring Sea : because property is property, and if the property in the fur-seal is affirmed to be in the United States, I agree most entirely with the argument of Mr Carter that that right of property is not lost because possession of the thing is lost.

The rights of property attach to a thing wherever the thing is ; so as to the herd, so as to the industry ; and what makes this point clear is that we have now upon the question of Regulations the argument put forward that in truth the greatest injury that is done to the seals as individuals, to the seals as a herd, to the industry carried on, or said to be carried on in relation to them, is done outside Behring Sea and in the approaches to the Aleutian passes ; and yet the limitation as to compensation is to depend simply upon “aye” or “no”, is there a right in the British subject to take seals in Behring Sea within the bounds claimed by the United States under its purchase from Russia.

Senator Morgan. — That is not the compensation that is provided in the *Modus Vivendi*. That compensation is provided, because the Government has taken this subject up, and it is a question between the Governments as to damages under the *Modus Vivendi*, because of their intervention in the matter of seal hunting or fishing, to prevent it.

Sir Charles Russell. — I quite agree, but I do not see how that weakens the force of my position.

Senator Morgan. — I do not say that it does at all.

Sir Charles Russell. — The two Governments, of course, are merely representatives of the interests of their respective nations.

Senator Morgan. — This is the first time they assumed to be so. They made the *Modus Vivendi* and agreed to submit the damages arising out of that fact to the Arbitrators.

Sir Charles Russell. — That may be. I am not concerned to dispute that. My point, of course, is this, that if the framers of this Treaty had any idea of raising before this Tribunal the question as it is now presented, of individual property in the seals or in the seal herd or in the industry founded upon it, the Article dealing with the question of compensation ought not to have been restricted, could not legally have been restricted, merely to killing within Behring Sea, especially as it is apparent, according to the allegation made on the other side, that the greater portion of the mischief is done outside Behring Sea.

Mr Justice Harlan. — May that not be explained in part by the fact that that relates to damages for abstaining from the exercise of that right, during the pendency of the Arbitration, to take seals outside Behring Sea?

Sir Charles Russell. — That is exactly what I am pointing out. If it was intended to say there was a right in the individual seals outside Behring Sea, or in the herd outside Behring Sea, or that the industry could be affected by anything outside Behring Sea, then the limit of compensation would not have been put as it is in the 5th Article. That is exactly my argument; but, of course, I am only beginning my justification of this meaning, because the Tribunal must be good enough to bear in mind. — I have in all conscience recurred to it often enough, and I am afraid, so as to weary the Tribunal, — that my contention is this, that the whole case of the United States actually presented in the diplomatic correspondence was a case founded primarily upon territorial dominion and jurisdiction in the eastern part of Behring Sea. The case based upon their municipal legislation — the case advanced in the Courts, inferior and superior — the case based on the Executive action — based on the instructions and argument of their counsel — based on the reasons on which they invoked the authority of their municipal Tribunals — based on the arguments presented to the Supreme Court — based on the judgments of those Supreme Courts, was a case founded upon this territorial dominion. I am not saying that there is not in the Case and Counter-Case put forward by the United States Counsel a different interpretation. I am dealing with

the Treaty, with the conduct of the United States and their advisers, and with the diplomatic correspondence up to the date of the Treaty. And now I turn to that correspondence for one moment, though not at any great length. I begin with an important letter of Mr Blaine, frequently referred to, of the 17th Dec., 1890, which is at page 263 of the large volume of the United States correspondence. I am not going to trouble the Tribunal with the whole of that letter.

On the 2nd of August 1890, the Marquis of Salisbury had written to Sir Julian Pauncefoot the letter of that date, to which I do not think I need refer, in which the Marquis of Salisbury says as you well recollect, Sir :

You will state that her Majesty's Government have no desire whatever to refuse to the United States any jurisdiction in Behring Sea which was conceded by Great Britain to Russia, and which properly accrues to the present possessors of Alaska

and so on.

Now on the 17th December Mr Blaine's letter is written, in which that passage occurs to the effect that : If Behring Sea was included in the phrase Pacific Ocean, then there is no ground of complaint; and towards the end of which he invokes some general considerations based upon, I think, Mr Phelps' letter of September 1888. But the part I am now upon is this. He says in that letter — I am reading from page 285 of volume I of the Appendix to the United States Case :

It will mean something tangible, in the President's opinion, if Great Britain will consent to arbitrate the real questions which have been under discussion between the two Governments for the last four years. I shall endeavour to state what, in the judgment of the President, those issues are.

And then he formulates a number of questions. Then he says, in the preceding paragraph to the one I have just read :

The second offer of Lord Salisbury to arbitrate, amounts simply to a submission of the question whether any country has a right to extend its jurisdiction more than 1 marine league from the shore.

Then he says :

Her exception placed an obstacle in the highway between continents. The United States, in protecting the seal fisheries, will not interfere with a single sail of commerce on any sea of the globe.

Then he proposes questions 1, 2, 3 and 4, all of which deal, as it is conceded, with the questions of exclusive jurisdiction and exclusive rights, and then he proceeds :

Fifth. What are now the rights of the United States as to the fur-seal fisheries in the waters of the Behring Sea outside of the ordinary territorial limits, whether such rights grow out of the cession by Russia of any special rights or jurisdiction held by her in such fisheries or in the waters of Behring Sea, or out of the ownership of the breeding islands and the habits of the seals in resorting thither and rearing their young thereon and going out from the islands for food, or out of any other fact or incident connected with the relation of those seal fisheries to the territorial possessions of the United States.

Now, shortly stated, that question is triefly this : What are now the rights of the United States as to the seal fisheries in the waters of Behring Sea outside the ordinary territorial limits, however such rights have arisen. *Seal fisheries in the waters of Behring Sea* : those are the words.

In further elucidation of that same meaning, I may point to question 6 which he suggests shall be as follows : —

If the determination of the foregoing questions shall leave the subject in such position that the concurrence of Great Britain is necessary in prescribing regulations for the killing of the fur seal in any part of the waters of Behring Sea, then it shall be further determined : First, how far, if at all, outside the ordinary territorial limits it is necessary that the United States should exercise an exclusive jurisdiction in order to protect the seal for the time living upon the islands of the United States and breeding therefrom. Second, whether a closed season (during which the killing of seals in the waters of Behring Sea outside the ordinary territorial limits shall be prohibited) is necessary to save the seal fishing industry, so valuable and important to mankind, from deterioration or destruction —

and so forth

Now in the answer on page 290 of the same volume, Lord Salisbury, writing to Sir Julian Pauncefote on February 21st, criticizes these questions. As to the 5th question he says, at page 294,

The first clause, what are now the rights of the United States as to the fur seal fisheries in the waters of the Behring Sea outside of the ordinary territorial limits? is a question which would be very properly referred to the decision of an Arbitrator.

Now I pass on. The next letter to which I desire to refer, is from Sir Julian Pauncefote to Mr Wharton, on page 326. There, Sir Julian Pauncefote writing to Mr Wharton says :

Either Government may submit to the Arbitrators any claim for compensation which it may desire to prefer against the other Government in respect of any losses or injuries —

You will observe the large words in which Sir Julian Pauncefote proposes the reference.

any losses or injuries in relation to the fur-seal fishery in Behring Sea.

And so on.

Mr Wharton replies on the 23rd of July, at page 326. He replies proposing instead this clause, which you will see printed in small type of page 398.

The Government of Great Britain having presented the claims of its subjects for compensation for the seizure of their vessels by the United States in Behring Sea

that matter is to be referred to the Arbitrators. Then I go on, next, to the letter of Mr Blaine to Sir Julian Pauncefote of the 4th of May 1891. This is distinctly in relation to the *Modus Vivendi*. It is at page 301. Mr Blaine there writes proposing the following arrangement.

The Government of the United States limits the number of seals to be killed on the islands, for purposes just described, to 7,500.

The Government of the United States guarantees that no seals shall be killed in the open waters of the Behring Sea by any person on any vessel sailing under the American flag or any American citizen sailing under any other flag.

The Government of Great Britain guarantees that no seals shall be killed in the open waters of the Behring Sea by any person.

and so on.

Now on the 3rd June 1891 at p. 305 this is the proposal which Her Majesty's Government puts forward for a *modus vivendi*.

The Government of Great Britain and of the United States shall prohibit, until May, 1892, the killing of seals in Behring Sea or any islands thereof, and will, to the best of their power and ability, insure that subjects and citizens of the two nations——

and so on.

And Mr Wharton, on the following day replies in the letter which is at page 306, and which will be found to be very important in this regard. He says :

I am directed by the President to say, in reply to your note of the 3rd instant, conveying to the Government of the United States the response of Her Majesty's Government to the proposal of Mr Blaine for a *modus vivendi*, relating to the seal fisheries in Behring Sea during the present season——

First. In place of the first and second subdivisions of the agreement, as submitted to you, the President suggests the following :

(1) The Government of Great Britain shall prohibit, until May 1892, the killing of seals in all that part of the Behring Sea lying east, eastwardly, or southeast — wardly, of the line——

that is the line of demarcation.

Then :

(2) The Government of the United States shall prohibit, until May, 1892, the killing of seals in that part of Behring Sea above described——

and so on.

He then proceeds, in the next paragraph, to say :

These changes are suggested in order that the *modus* may clearly have the same territorial extent with the pending proposals for arbitration;

You observe the words “ *thèse changes* ” — that is to say the limitation to the eastern part. You will observe the counter proposal was general — “ *all killing in Behring Sea* ”. Says Mr Wharton : We change that to “ *the eastern part of Behring Sea* ”.

These changes are suggested in order that the *modus* may clearly have the same territorial extent with the pending proposals for arbitration.

Then, near the middle of the third paragraph of that letter, he says :

The fourth clause of the proposal of Her Majesty's Government, limiting the taking effect of the *modus vivendi* upon the assent of Russia, presents what seems to the President an insuperable difficulty——

and so on.

Then he says :

He is surprised that this result did not suggest itself to Lord Salisbury, and does not doubt that it will be apparent to him on a re-examination.

Then comes this important passage : I respectfully ask attention to this language : —

I am also directed to remind you that the contention between the United States and Great Britain has been limited to that part of Behring Sea eastward of the line of demarcation described in our convention with Russia—————

and so on.

Then the final sentence in that paragraph is in these words :

It was never supposed by any one representing the Government of the United States in this correspondence, or by the President, that an agreement for a *modus vivendi* could be broader than the subject of contention stated in the correspondence of the respective Governments.

In other words, it is limited to the eastern part of Behring Sea, and cannot go outside the eastern part of Behring Sea, and it never occurred — it was never supposed by anyone representing the Government of the United States — that the *Modus Vivendi* could be broader than the subject of contention. Now in the next sentence he says :

Negotiations for an Arbitration have been proceeding between the United States and Great Britain, and if these Powers are competent to settle by this friendly method their respective rights and relations in the disputed waters—————

always a limitation of area—————

upon a permanent basis, it would seem to follow that no question could arise as to their competency to deal directly with the subject for a single season. If Great Britain now insists upon impossible conditions, viz ; that the conclusion of a *modus vivendi* is to be delayed until and made contingent upon the assent of Russia to stop the killing of seals on its own islands and in its own waters, and upon the exercise by the President of powers not conferred by law, this would be, in his opinion, a practical withdrawal by Great Britain from the negotiations for a *modus vivendi*—————

and so on.

Then comes the memorandum from Sir Julian Pauncefote, with which I do not think I need trouble you. But, finally, on the 9th of June, Mr Wharton wrote proposing the *Modus Vivendi* which was ultimately actually adopted ; and in the letter on the subject you will find this passage, on page 312.

As to the third clause of your proposition, I am directed to say that the contention between the United States and Great Britain has relation solely to the respective rights of the two Governments in the waters of Behring Sea, outside ordinary territorial limits, and the stipulations for the co-operation of the two Governments during this season have, of course, the same natural limitation. This is recognized in Articles I and II of your proposal—————

and then he goes on to argue the point.

Then comes the Agreement, which he sets out at page 313.

An Agreement between the Government of Her Britannic Majesty, and so on, for

the purpose of avoiding irritating differences, and with a view to promote friendly settlement of the questions pending between the two Governments touching their respective rights in Behring Sea and for the preservation of the seal species, the following Agreement is made.

At this time, it is clear that the fifth question which I am now upon, had been already settled and determined, as appears from a letter of the 14th April, 1891. This therefore is the *modus vivendi*.

Her Majesty's Government will prohibit until May next seal killing in that part of Behring Sea lying eastward of the line of demarcation

and so on

The United States Government in the same part of Behring Sea will prohibit seal killing for the same period.

Then :

Every vessel or person offending against this prohibition in the said waters of Behring Sea———

and so forth.

And now comes, at page 353, a letter of the 24th February 1892, from Mr Blaine to Sir Julian Pauncefote.

We have now passed the time of the agreement to the Treaty.

I am in receipt of your favour of the 19th. You therein inform me that Lord Salisbury cannot express any opinion on the subject of the *modus vivendi* until he knows what we desire to propose. I am glad to hear that Lord Salisbury contemplates a *modus*.

This is the *Modus Vivendi* of 1892.

Then he goes on to say :

If Her Majesty's Government would make her efforts most effective, the sealing in the North Pacific Ocean should be prohibited, for there the slaughter of the mothers heavy with young is the greatest.

Then on the 7th March, Sir Julian Pauncefote again writes, which will be found at page 355 :———

Lord Salisbury's proposal of a 30 mile radius round the Pribilof Islands within which no sealing should be allowed, is a judicious temporary measure of precaution pending the establishment of permanent Regulations for the fishery as a whole. It is a somewhat larger proposal than that which you originally made to me on the 16th March 1891, and which was for a similar radius of 25 miles only.

Then comes the most important of these letters from Mr Wharton to Sir Julian Pauncefote, of the 8th March, 1892, which is at page 356.

The United States claims an exclusive right to take seals in a portion of Behring Sea, while Her Majesty's Government claims a common right to pursue and take the seals in those waters outside a three-mile limit. This serious and protracted controversy, it has now been happily agreed, shall be submitted to the determination of a Tribunal of Arbitration, and the Treaty only awaits the action of the American Senate.

We have, therefore, got to the point not merely of the Treaty of

Arbitration, but we have at this time reached the second *Modus Vivendi*, and here we have Mr Wharton's distinct intimation of what is at that point (and Mr Wharton was quite right, because it was the case that was made in the previous diplomatic correspondence), the case made as to the justification of the seizure.

The United States claims an exclusive right to take seals in a portion of Behring Sea, while Her Majesty's Government claims a common right to pursue and take the seals in those waters outside a three-mile limit.

That is exactly what I say is the issue intended to be raised by this fifth question.

I think there is one other passage that perhaps I ought to read :

The President cannot agree, now that the terms of Arbitration have been settled, that the restrictions imposed shall be less than those which both Governments deemed to be appropriate when it was still uncertain whether an early adjustment of the controversy was attainable. He, therefore, hopes that Her Majesty's Government will consent to renew the arrangement of last year with the promptness which the exigency demands, and to agree to enforce it by refusing all clearances to sealing vessels for the prohibited waters, and by re-calling from those waters all such vessels as have already cleared. This Government will honourably abide the Judgment of the High Tribunal which has been agreed upon, whether that Judgment be favourable or unfavourable, and will not seek to avoid a just responsibility for any of its acts which, by that Judgment, are found to be unlawful. But certainly the United States cannot be expected to suspend the defence, by such means as are within its power, of the property and jurisdictional rights claimed by it pending the Arbitration and to consent to receive them from that Tribunal, if awarded, shorn of much of their value by the acts of irresponsible persons.

Senator Morgan. — Will you allow me to suggest to you this enquiry? The *Modus Vivendi* of 1891, as I understand, is not included in the Treaty of February the 29th 1892; but the *Modus Vivendi* of 1892 is included in that Treaty?

Sir Charles Russell. — Quite so.

Senator Morgan. — The *Modus Vivendi* of 1891 is entirely left out of consideration in the Treaty of February the 29th 1892?

Sir Charles Russell. — That is so, Sir.

Senator Morgan. — Now, the proposition you have just read is that the United States claims an exclusive right to take seals in a portion of Behring Sea, while Her Majesty's Government claims a common right to pursue and take the seals outside of the 3 mile limit. I wish to call attention to this as a question, and only as a question, whether that exact subject is not provided for in Article I, instead of in the 5th point in Article VI?

Sir Charles Russell. — No; with great deference, I think not, because question I, as you yourself very early in the discussion pointed out, is entirely conversant with what exclusive jurisdiction and what exclusive rights Russia asserted and exercised.

Senator Morgan. — I spoke of article I of the Treaty.

Sir Charles Russell. — Oh, I beg your pardon.

Senator Morgan. — I think when they came to formulate the Treaty, and drew up the final agreement, the question you have been considering and reading an extract from was included in the first question submitted in Article I of the Treaty.

Sir Charles Russell. — I was about to refer to that Article, strangely enough, in an entirely different sense, to show that that supports, as I submit, the contention I am upon.

Senator Morgan. — It may do so.

Sir Charles Russell. — The thread of that contention on the part of the United States runs all through the assertion of exclusive jurisdiction in a defined area, and I submit it is borne out by the language of Article I.

The questions which have arisen between the Government of Her Britannic Majesty and the Government of the United States concerning —

what?

the jurisdictional rights of the United States in the waters of the Behring Sea, and concerning also the preservation of the fur-seal.

Jurisdictional rights to be determined as a matter of right : the preservation of the fur-seal to be determined as a matter of regulations.

Senator Morgan. — The questions submitted seem to be presented in Article I, while the five suggestions or enquiries in Article VI are called points — five points which very properly may be included within the questions for consideration. The question submitted to the Arbitration seems to me to be worthy of consideration, whether the questions are not the ones to which the Award must respond.

Sir Charles Russell. — I should have thought, with deference, that the questions are formulated, and if there be anything outside these questions mentioned in Articles VI and VII which the Tribunal should thinkought to be answered, of course they are to be answered; but I take Articles VI and VII as intended, whether they have been effective or not is another question, to formulate for the assistance of the Tribunal the precise questions which would settle the controversy between the parties. The way in which the matter is put is this :

In deciding the matters submitted to the Arbitrators it is agreed that the following five points shall be submitted to them, in order that their award shall embrace a distinct decision upon each of the said five points, to wit

and then Article VII very properly treats those as questions.

If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such a position that the concurrence of Great Britain is necessary

then there are to be Regulations.

Senator Morgan. — That brings us up to the point whether or not the word “ questions ” in article VII does not refer to the three questions

which are propounded in the first Article of the submission, and not to the five points mentioned in Article VI.

Sir Charles Russell. — I should with great deference have said, when Article VII began with the words “ If the determination of the foregoing questions ”, which you will observe are all put with a note of interrogation at the end of them, that Article VII pointedly, clearly, and distinctly referred to the foregoing five questions, and I think I am right in saying, subject to correction on that point, that there was not any difference in the argument of my learned friend and that which I now submit.

Senator Morgan. — I am aware of that fact, but, of course, we have our own views.

Sir Charles Russell. — Naturally, and I do not suggest the contrary. Now I think I have only to refer to two other letters. On the 22nd March there is a letter from Mr Wharton to Sir Julian Pauncefote at page 361 :—

For it must not be forgotten that if her Majesty's Government proceeds during this sealing season upon the basis of its contention as to the right of the Canadian sealers, no choice is left to this Government but to proceed on the basis of its confident contention that pelagic sealing in the Behring Sea is an infraction of its jurisdiction and property rights.

Finally, on page 363, Sir Julian Pauncefote writes to Mr Wharton thus : _____

As an alternate course, Her Majesty's Government are also willing, after the ratification of the Treaty, to prohibit sealing in the disputed waters, if vessels be excepted from the prohibition which produce a certificate that they have given security for such damages as the Arbitrators may assess in case of a decision adverse

and so on.

Then there is a letter on page 364 : _____

With reference to my previous note of this date, and to the discussions which have taken place regarding the claims of our respective Governments to compensation in relation to the fur-seal fishery in Behring Sea, I have been instructed by the Marquis of Salisbury,

and so on. Then he says this : _____

That in case the Arbitrators shall decide in favour of the British Government, that Government may ask them further to decide whether the United States Government has since 1885 taken any action in Behring Sea directly inflicting a wrongful loss on the United States or its lessees, and if so, to assess the damage incurred thereby.

Senator Morgan. — But that feature did not get into the Treaty.

Sir Charles Russell. — That is the feature which did get into Article V of the *Modus Vivendi*, which is a part of this Treaty.

Senator Morgan. — Yes.

Sir Charles Russell. — Then there is one passage which I wish to emphasize before I go on, in the letter of the 4th of June, 1891; it is at the foot of page 306 :

The fourth clause of the proposal of Her Majesty's Government, limiting the

taking effect of the *modus vivendi* upon the assent of Russia, presents what seems to the President an insuperable difficulty, as an adherence to that suggestion by Her Majesty's Government will, in his opinion, prevent the conclusion of any Agreement and will inevitably cause such a delay.

and so on :

That I have already read. You observe that the object of Sir Julian Pauncefote was, by including Russia, to have the extension of the *Modus Vivendi* so as to prohibit the killing in other parts of the Behring Sea westward of the line of demarcation; and this is the way in which that suggestion is met by Mr Wharton.

I am also directed to remind you that the contention between the United States and Great Britain has been limited to that part of Behring Sea eastward of the line of demarcation described in our convention with Russia, to which reference has already been made, and that Russia has never asserted any rights in these waters affecting the subject-matter of this contention and cannot, therefore, be a necessary party to these negotiations if they are not now improperly expanded. Under the Statutes of the United States, the President is authorized to prohibit sealing in the Behring Sea within the limits described in our Convention with Russia, and to restrict the killing of sea]s on the Islands of the United States. But no authority is conferred upon him to prohibit or make penal the taking of seals in the Waters of Behring Sea westward of the line referred to, or upon any of the shores or islands thereof. It was never supposed by anyone representing the Government of the United States in this correspondence, or by the President, that an Agreement for a *modus vivendi* could be broader than the subject of contention stated in the correspondence of the respective Governments.

Now, Sir, I submit that I have said enough to show that I am raising a grave question for the consideration of this Tribunal, as to the true construction of that question 5 : whether, in other words, I am not justified in stating that that question, like the first four, is conversant with questions of jurisdiction and exclusive right in a limited area, namely, the eastern part of Behring Sea; and that in no part of the correspondence leading up to the Treaty, nor in the Treaty itself, is there raised the question of a right of property in the individual fur-seal, or in the herd, or in the industry based upon the fur-seal, except as a question of jurisdiction within this limited area. I, of course, have already told the Tribunal that I cannot venture to assume that the meaning which I am putting upon this question is the meaning which the Tribunal will say is right, and, therefore, it would be incumbent upon me to argue it presently as if it had a different meaning, such as my learned friend suggests. That I will not shrink from doing, but I feel bound to put before the Tribunal our view, justified as I contend by the legislative and executive action of the United States, and by the diplomatic correspondence : that from first to last this was a question, in whatever shape it was put, which was based upon jurisdiction of an exclusive, in other words of a territorial character, and it is properly in that character referred to, in Article VII, as being a question of exclusive jurisdiction.

Now I must assume at this present stage of my argument that the

question is, has the United States an exclusive right to take fur-seals in the eastern part of Behring Sea, and an exclusive jurisdiction to enforce and protect by the exercise of sovereign power that right in the eastern part of Behring Sea?

The President. — Do you believe that the words in Article VII

The fur-seals in or habitually resorting to the Behring Sea

were originally conceived as making part of the first wording of that Article VII, or were they brought in afterwards? Do you know anything about that?

Sir Charles Russell. — I can answer that question, Sir, because the original frame of the questions is to be found in Mr Blaine's letter of December 1890. I have read that letter to you and I will read it again. It is in page 286 of the United States Appendix Volume 1. Of course I have read the correspondence which brought it down to a later period, showing the views of Mr Wharton after the Treaty was actually executed and signed. The words are there in the original letter of Mr Blaine; and if you turn to page 295, you will see that Mr Blaine repeats the substance of the same question in that letter of the 14th April 1891; the 5th question is stated in the form in which it is there suggested.

Mr Justice Harlan. — What Baron de Courcel is referring to now is, what is the 7th Article, but which was originally the 6th question: and that 6th question, in the form in which it appears in the Treaty first appears in Mr Wharton's letter of June 25th 1891, page 319.

Sir Charles Russell. — That is quite right.

Mr Justice Harlan. — That is where the words "habitually resorting to" come into the 6th question?

Sir Charles Russell. — Yes, but with great deference they also appear, not as part of the 7th question, for there was no 7th question at that moment, but they also appear in the letter of Mr Blaine of the 17th December that I have mentioned.

Lord Hannen. — Is that their earliest appearance?

Sir Charles Russell. — As far as I know.

Mr Justice Harlan. — What do you say appears there?

Sir Charles Russell. — They do not appear in the letter of December 17th — I mean not exactly.

Mr Justice Harlan. — I have not been able to find them in the sixth question anywhere prior to June the 25th, 1891.

Sir Charles Russell. — I think that is correct.

Mr Justice Harlan. — When Mr Wharton reframes the sixth Question, he submits it in the precise words of Article VII.

Sir Charles Russell. — I think you are right; I think that is so.

Senator Morgan. — A different mind had got hold of the correspondence, and put in that additional idea.

Sir Charles Russell. — I should like to emphasize this. If you will

turn to page 305, you will see that, at that time, the five Questions had been settled; and Sir Julian Pauncefote writes.

The undersigned has been instructed by the Marquis of Salisbury to inform the United States Government that Her Majesty's Government are prepared to assent to the first five questions proposed to be submitted to arbitration in the note of the Hon. James G. Blaine to the undersigned, dated 14th of April last.

That letter is at page 295.

Her Majesty's Government cannot give their assent to the sixth question formulated in that note. In lieu thereof they propose the appointment of a commission to consist of four experts, and so on. "The Commission shall examine and report on the Question which follows":

For the purpose of preserving the fur-seal race in Behring Sea from extermination, what international arrangements, if any, are necessary between Great Britain and the United States and Russia or any other power?

As regards the question of compensation, Her Majesty's Government propose the following article.

It shall be competent to the Arbitrators to award such compensation, and so on.

Therefore at that date, and long before the correspondence with Mr Wharton which I have been reading, the first five questions had been settled, and I was using that correspondence for the light it throws upon the meaning which Mr Wharton attached to those five questions. Then, after the 3rd or 4th June arises the question which is now the 7th Article, namely the question of Regulations. That is the way in which the matter stands.

The President. — Then you do not construe the protection spoken of in question 5 of Article VI in the same way as the protection mentioned in Article VII?

Sir Charles Russell. — In one sense yes, and in another sense no. I would prefer, if the Arbitrators would allow me to do so, to reserve my construction of Article VII till I come to it. I think it would be better that I should do so. I have a strong view about it, if the President will allow me to say so, but I do not want to mix up the question of right and the question of Regulations.

Senator Morgan. — It occurs to me, perhaps I am entirely mistaken, that the decision, whichever way it may turn, on the five questions in Article VI — still omits a decision upon this question of the rights of the citizens and subjects of either country as regards the taking of fur-seals in or habitually resorting to the said waters. Of course, that question would be negatively answered in the affirmative proposition that the seals belonged to the United States, or that the United States had a right of protection over the seals; but, at the same time, this affirmative question is put to the Arbitrators; and we are instructed here that we shall decide every question that is submitted to us, and it seems to me that we must give an affirmative answer on that proposition. I mean, by an affirmative answer, a direct answer.

Sir Charles Russell. — I think you do. I should have respectfully

submitted, as far as I can at present see, that the answers to the first five questions answer everything. For instance, assume the first four questions to be decided in the sense that Russia exercised and asserted these rights and that Great Britain recognized and conceded them, and that to those rights the United States succeeded by right of cession, then the answer in that sense would be the negation of the right of anybody else, because you would have then found that there was an exclusive right and an exclusive jurisdiction, and that would be a distinct answer. Equally the other way; if the answer is there was no exclusive right and no exclusive jurisdiction, then it follows that it is left to be determined according to general international law; in other words, it is a matter of common right. Article I is a mere general statement of the nature of the questions that have arisen. Article VI deals with the specific points which are to determine those questions.

Senator Morgan. — But Article I says : “ These questions shall be submitted to a Tribunal of Arbitration ”.

Sir Charles Russell. — Yes; that is to say, the matters that have arisen.

Senator Morgan. — No; “ these questions. ”

Sir Charles Russell. — I know, Sir; but that is a description merely of the matters of difference that have arisen. That is my conception.

Now if I am right in this interpretation — and I have said all I desire to say upon it — I may deal with the argument upon it very briefly indeed. I have, in fact, already dealt with it in the argument as to Russian assertion of rights and Russian exercise of rights, because although it is true to say that question I of Article VI does not ask what rights Russia in fact had, but only what rights she asserted and exercised, it is not too much to say that if she had any other rights than those she did assert and exercise, she would have asserted them and exercised them if it had been necessary for her purpose to assert and exercise them.

We have come therefore to this point : That if my interpretation is right — and of course I am arguing upon that assumption at present — it must be held that the United States can assert that it has rights which Russia had not. In effect it comes to that. I have already discussed what rights Russia had. Russia was the possessor of dominion on the Pribilof Islands. She was therefore the owner of the islands to which these animals resorted for a considerable portion of the year. She therefore had special facilities for capturing, taking possession of, and killing these animals. She had that exclusive right by reason of her territorial dominion. She had the extension of that exclusive right to the three mile limit, or whatever the marginal belt is to be considered. She had no right beyond, unless there is to be asserted on the part of Russia, or on the part of United States, some power over the adjoining sea of an exclusive kind, which is not found to be recognized by international law. There may be such a right if there is property in the fur-seal. That I shall discuss when the question comes up. There may be such a right if there is property

in the seal herd. That I shall discuss when I come to the question in its proper order. I am assuming that the question relates not to property in the seal, and not to property in the herd, but to what the rights are; and the circumscription of the rights which, as territorial owner, any nation possesses is, according to authority, exactly as I have stated it.

Now, what is the foundation of this argument? The ultimate foundation of it is this — that no question of exclusive jurisdiction in a defined area can exist apart from territorial dominion, from sovereign power, over that area; because the assertion of exclusive jurisdiction is an assertion that nobody else has a right to go there; is an assertion of the right to exclude everybody else from that place; is an assertion of the right to treat the particular area covered by so much water just on the same principle as if it were so much land, and a part of the admitted *terra firma* of the particular Power that is claiming to exercise it. What does that amount to when it is extended to a claim on the high seas? It conflicts with, is repugnant to, two great principles : first, the principle of limitation of territory to a specific distance from the shore, *terræ dominium finitur ubi finitur armorum vis*. It is next repugnant to the great principle of the equality of every nation, small and great, upon the high sea outside the three mile limit, or whatever the marginal belt is. It is therefore an assertion conflicting with the sovereignty of any and all other Powers, who are equal and have equal rights upon the high sea.

Exclusive jurisdiction in a defined area cannot exist apart from territorial dominion.

Am I to be invited by the Tribunal to justify that position, apart from the right of defence incident to property, which I am not dealing with? I am assuming the question to mean what I have endeavoured to demonstrate it means. Is it necessary that I should argue that upon the basis there is no such right? Why, it is hardly put forward in the argument of my learned friend. What is put forward by my learned friends is to be found on page 19 of their Counter Case.

The distinction, between the right of exclusive jurisdiction over Behring Sea on the one hand, and the right of a nation on the other hand, to preserve for the use of its citizens its interests on land by the adoption of all necessary, even though they be somewhat unusual, measures, whether on land or sea, is so broad —

Yes, indeed!

as to require no further exposition.

And so they are content to leave this proposition. If that means preserve for the use of its citizens its interests on land by adopting measures at sea to protect its property or its property interest, which I suppose is what is meant, I will deal with it presently; but what I am dealing with now is the first part of the case, that this claim, this question five, points to the right of the exclusive territorial jurisdiction over the eastern part of the Behring Sea; and if that be the right meaning of the question, my learned friends admit it is the latter right,

not the former, that the United States contend to have been exercised, first by Russia, and later by themselves.

The President. — Sir Charles, if you construe the question five as meaning only rights of jurisdiction, do you not think then that question five would be just a repetition of question four?

Sir Charles Russell. — In one sense yes, and in another sense no.

The President. — I say if under question five in Article VI we are to understand nothing but rights of jurisdiction—

Has the United States any right, etc...

that would be just exactly the same as question four.

Did not all the rights of Russia as to jurisdiction pass unimpaired to the United States?

Sir Charles Russell. — I quite agree, Sir; practically, yes. That is what I am arguing. I have argued this question five, and my meaning is the same when I have been discussing the first four questions, except with this difference: that articles one, two, three and four deal solely with derivative rights from Russia, and in article five the question is, what rights has the United States as a matter inherent in its own possession of territory.

The President. — The authors of the Treaty must have anticipated something different from what was in the preceding questions.

Sir Charles Russell. — It does not necessarily mean that it should be something different. It contemplates the possibility of its being something different; but it merely contemplates the possibility in this sense: "We assert that Russia asserted certain exclusive claims of jurisdiction; we also assert that we have certain exclusive claims of jurisdiction".

In each case, if my contention is right, it is limited to a claim of territorial dominion.

The President. — I believe, as we understand the case of the United States, they understood that this question five meant also derivative rights. They did not argue that they had new rights which originated in the cession of territory in their hands only, but that the same rights were vested in Russia.

Sir Charles Russell. — That is what I venture to say; and that is the reason I said that in arguing what rights Russia asserted and exercised, I was also really arguing question five. You see the distinction is that questions one, two, three and four, were directed to what rights were asserted and exercised. Question five may have a more restricted or a more enlarged meaning — what rights in fact the United States have. But I was about to say that I could deal with this matter very briefly because I have shown, if my interpretation of the question is right, that that is not the nature of the right which the United States are claiming for themselves; because I take it that although this is a statement that the latter right, and not the former, is the right which the United States contend

was exercised first by Russia and later by themselves, that they embrace not only their own derivative claim under Russia, but their own claim, whatever it is, as inherent in their territorial possessions.

The President. — Their argument is that they have peculiar rights. Your argument is that this question merely limits the right of jurisdiction, like the preceding questions?

Sir Charles Russell. — Unquestionably, sir, although it is conceivable that there may have been a right which the United States possessed that Russia neither asserted nor exercised. It is conceivable. That is all.

The President. — You think it is upon that hypothesis that the question has been brought in?

Sir Charles Russell. — I can only judge by the terms of the question itself. I take the language in which Mr Wharton, the Acting Secretary of State, construes it. I take the language in which the diplomatic correspondence construes it.

I was going to say I propose to deal briefly with this because of the views which have been put. The point where my friends and I differ — materially differ, I mean — here, is as to what the meaning of this question is. I have already told the Tribunal I am not going to assume my meaning is the correct one. I propose to argue it also on the basis that their meaning is the correct one. That I will presently come to; but I must take it step by step.

The President. — Do you mean to argue it at some length?

Sir Charles Russell. — I have four or five authorities; but they are authorities upon points which I conceive not to be disputed.

The Tribunal thereupon adjourned until Tuesday, May 22, 1893, at 11 : 30 o'clock a. m.

TWENTY-FIFTH DAY. MAY 23RD, 1893.

The President. — We are happy to resume our hearing again, Sir Charles, and are quite ready to hear you.

Sir Charles Russell. — Mr President, when the Tribunal last sat, I was discussing what was the true meaning of question 5 of Article VI. I had pointed out what we conceive to be the meaning, and I had added that I proposed also to discuss the different effect given to that question in various forms in the Argument on the part of the United States. While I was endeavouring to establish the point that question 5 is of the same character as the preceding questions, in the sense that it relates to a question of exclusive jurisdiction, and is so designated in the succeeding Article VII, — while I was dwelling upon that point, you, Mr President, put to me the question whether the result of the argument would not be in effect to say that question 5 was the same as question 4 : to which I answered, and I repeat that answer : in effect, yes. But I have now to suggest the probable reason why question 5 was added.

It will be observed by the Tribunal that all the previous questions, 1, 2, 3, and 4, are conversant with rights which Russia asserted and exercised. It has, therefore, nothing to do with what rights Russia possessed.

Therefore question 5 might properly find a place in the Article in order to cover the possibility (it was no more than a possibility) that there were rights which Russia had in fact, but which she did not assert or which she did not exercise. That would I think be a sufficient explanation by itself why question 5, although of the same character as the preceding questions, still finds a place in that Article. A further explanation might be found in this fact, that at the period to which the first four questions relate, namely, the period of Russian dominion, the whole of the territory on the east side of Behring Sea down to and including the Aleutian chain, and the whole of the territory upon the west side of Behring Sea from Behring Straits down to the southern side of Kamschatka, were also Russian territory. Therefore question 5 may also have been framed in order to leave open the point whether any rights over the intervening waters that Russia may have asserted and exercised, treating it if she so willed, and as she professed to have the power to do, as a shut sea — whether that condition of things was or was not altered when the portion of the territory bounding the eastern side of Behring Sea passed into other hands so that the territory on each side came to be in different ownerships.

But so far as the mere questions in Article VI are concerned — I say

it with all respect to my learned friends — I care not what meaning is put upon them so far as those five questions are concerned.

I shall have to submit that just in proportion as they depart from the main argument of Mr Blaine based upon the assertion of territorial dominion derived from Russia, just so in proportion do they become more and more involved in absurdities, more and more indefensible in law become the positions they assume. I only attach importance to it and would not have dwelt even at this length upon it but that it has strictly a more wide-reaching significance; because I have utterly failed in my argument if I have not conveyed to each member of this Tribunal the contention which we are submitting, that in truth the whole area of dispute between these parties was Behring Sea, and nothing outside Behring Sea: and that if the area of dispute was Behring Sea, and nothing but Behring Sea, the area of jurisdiction of this Tribunal is restricted within the same limits.

But I repeat, and I leave that part of the argument by saying that I think the Tribunal will find the more they examine the history of the United States' contention, their executive action, their proceedings in their local Courts, the arguments of their representative counsel at Washington — the Solicitor and Attorney General — the diplomatic correspondence, Article VII of this Treaty, and lastly Article V of the *Modus Vivendi*, which recognizes and limits the right to compensation to be paid by us if we have no right to kill seals merely in the Behring sea — that, taking all these things into consideration, the Tribunal, whatever may be its desire, will find it exceedingly difficult to satisfy themselves that the area of dispute is not limited by the terms of this Treaty strictly to Behring Sea.

I have now to say in connection with this, and to repeat what I have already said, that if my suggested interpretation of these questions be correct, namely, that it meant an exclusive right to take fur-seals in Behring Sea, that is to say, a property right of an exclusive character in the fishery in Behring Sea and not in the seals as individuals or in the herd, and that the claim of protection referred to meant a claim of exclusive jurisdiction to protect them within the eastern part of Behring Sea,— that if that be the true meaning, I am saved the discussion of it, because I have already discussed it, and discussed it at length, under the question of the derivative title claimed under Russia. I hope that is appreciated by the Tribunal, and I do not desire to repeat myself, nor do I at this stage propose to trouble the Tribunal with the citation of the authorities which show that a claim within a definite area and a claim by which it is sought to exclude other ships of other nations from that definite area of the sea, is a question of the sovereignty: that nothing can justify it according to the rules of international law short of an assertion founded upon the just reasons of prescription and acquiescence, upon which alone can be based claim of territorial dominion pure and simple.

Now, I assume, and I confess it would be quite natural that the Tribunal should be anxious to assume, as wide a meaning to this 5th question

as it is capable of; for I agree it is much more important to determine what rights the United States has rather than what is the meaning of this particular question, although the Tribunal, of course, will see that, in order to answer that question correctly, the attempt must be first made to fix what the true meaning of the question is. I have suggested one.

Now, I will assume that it means the assertion of a right of property in one of three different forms : in the seals, or in the herd as it has been called, or in the industry founded upon the seals; and, correlative to that right of property, the further right of protecting it by search, seizure and confiscation; and I proceed, therefore, to enquire whether there is, in any one of those alleged forms, any legal right of property whatever in the United States.

I am glad to find myself in agreement on some points with my learned friends; I agree that the question of property in the seals or in the seals as a collection, or group, or herd, depends upon the

Assertion of property
in the " herd " exa-
mined.

nature and habits of the animal and the physical relations of the United States to that animal. For my own part I

am entirely unable to draw any distinction between the claim of property in the seals and the claim of property in the so-called seal herd. I cannot see where there is any legal ground for any such distinction. If there is property in the individual seals, there is property in the herd composed of those individual seals. If there is no property in the individual seals, it passes human comprehension, at least my comprehension, how it can be alleged that there is a property in the herd or collection of individual seals. Because it cannot be that a congregation of items each one of which is, upon the hypothesis, not property, yet, when they make up the whole, which is called a herd, become property. The question, therefore, really is; Is there a property in the individual seals? Because I am not going to argue (it would be absurd, in my judgment, to argue), that if there is a property in the individual seals, there is not a property in the herd which is made up of a number of individual seals. I will speak of the industry presently. Upon this part of the case the question is : — Has the United States property in the individual seals?

Now, I would like the Tribunal to note the signs of distrust with which this argument is advanced upon the part of the United States. I propose to cull some brief passages from the written Argument of my learned friends. At page 104 this passage occurs :

It may be asked whether the claim made by the United States goes to the extent of asserting a legal right of property in *any individual seal* which may at any time be found in the seas between the Pribilof Islands at the north and the coast of California at the south. And whether they would insist that in the case of any seal captured anywhere within those limits by any person other than a native Indian, and for purposes of scientific curiosity, or to satisfy hunger, a trespass had been committed upon the property of the United States, and an action might be maintained in their name in a municipal tribunal to recover damages, or for the recovery of the skin of the animal, if it should anywhere be found. The United States do not insist upon this extreme point, because it is not necessary to insist upon it. All that is needed for their purposes is that their *property interest* in the *herds* should be so far

recognized as to justify a prohibition by them of any *destructive pursuit* of the animal calculated to injure the industry prosecuted by them on the islands upon the basis of their property interest. The conception of a *property interest in the herd*, as distinct from a particular title to every seal composing the herd, is clear and intelligible; and a recognition of this would enable the United States to adopt any reasonable measures for the protection of such interest.

Well, Mr President, it may be my fault — the Tribunal must say — but I confess so far from the conception of a property interest in the herd being clear and intelligible as distinct from a particular title to the individuals composing the herd, I utterly and absolutely fail to appreciate it — The sole point is property or no property. How in the name of heavens, if there be no property in the individual seal, the collection of a number of items, each of which is not property, yet go to make up property in the whole, I cannot realize; and it is a matter greatly I think to be regretted that either in the written argument, or in the oral argument, more effort was not made to convey this so-called clear intelligible conception to minds like those of my learned friends and like mine, which have certainly entirely failed to grasp it.

Now another passage in the same sense is found in page 133 in the same argument.

While the United States Government asserts and stands upon the full claim of property in the seals which we have attempted to establish, it is still to be borne in mind that a more qualified right would yet be sufficient for the actual requirements of the present case. The question here is not what is the right of ownership in an individual seal, should it wander in some other period into some other and far distant sea; that is an inquiry not essential to be gone into; but what is the right of property in the herd as a whole,

But the whole is made up of parts; and if there is no property in the parts how is there property in the whole? —

in the seas and under the circumstances in which it is thus availed of by the United States Government as the foundation of an important national concern.

Now, lastly (and I cannot deny myself the pleasure of referring to this), when my friend Mr Carter got to this very ticklish point, some of the members of the Tribunal interposed questions. I am referring to page 475 of the revised text of my friend Mr Carter argument.

Mr Carter. — One moment, Sir Charles — there are not that number of pages in the argument as revised by me. I do not know what you are referring to as the “ revised text. ”

Sir Charles Russell. — I am referring to the report which we have been furnishing to the Tribunal.

Mr Carter. — I shall insist that the only report that can be referred to is the one revised by me.

Sir Charles Russell. — That would indeed be very strange.

The President. — If there is any objection to what Sir Charles Russell reads, you will be able to state your objection.

Mr Carter. — Yes, but I object to the practice of referring to it.

Sir Charles Russell. — That would be very extraordinary. I have not even read my friend's argument in any other form than the form with which I have been familiar.

The President. — Both reports are unofficial.

Mr Carter. — Yes, but of two unofficial reports I submit that the one which the Tribunal should use in a matter of reference should be the one prepared by counsel.

The President. — If there is any doubt about it, of course, you will refer to your text.

Sir Charles Russell. — I think my friend will see that he has no reason to complain.

Mr Carter. — I object to the practice, that is all.

Sir Charles Russell. — Then I insist on my right, Mr Carter, if you put it so.

Mr Carter. — And I object to it.

Sir Charles Russell. — I was going to say that, my friend will have no reason to complain, because if there be anything that he wishes to disavow in what is here recorded, I will accept his disavowal at once.

Mr Carter. — Yes, but there is an authorized report of the argument.

Lord Hannen. — There is no such thing as an authorized report of the argument.

Sir Charles Russell. — With great deference, I cannot accept the statement of my learned friend. The authorized argument was the oral argument. We for our convenience, and at our own sole cost, have furnished the Tribunal all through with an authentic report, carefully revised as far as the intelligence of those to whom that task was allotted enabled them to do it — fairly and properly revised.

Lord Hannen. — You will tell us what you believe Mr Carter said, and if any dispute arises upon it, of course we shall be very happy to hear what Mr Carter has to say about it.

Sir Charles Russell. — I may at some future time, although I will not promise, have the pleasure of reading my friend's revised edition of his argument, but at present I have not seen it or even looked at it.

Now the page of the daily report to which I am referring is page 475, and my learned friend is dealing with that very thorny subject — the early history of pelagic sealing. He is face to face with the fact, which he admits, that the first and earliest pursuit of fur-seals known in the history of the human race was pelagic fur-sealing, carried on no doubt in a rude fashion — not in as effective a fashion as modern appliances permit, but still carried on as a means of subsistence, and as a means of affording articles for barter (and in that way furnishing them to commerce), along the coast at the instance of the aboriginal natives. My learned friend, addressing himself to that subject, said :

As I said before, many times in the course of my argument, the attack by barbarians on the fruits of the earth is limited, confined, and generally not destructive; but when civilization makes her attack upon them her methods are perfectly

destructive, unless she makes use of those appliances which civilization teaches her by which that destruction may be avoided. Therefore, there is no difficulty in awarding to the United States a right of property, subject to the right of the Indians to capture in the manner in which they were formerly accustomed to do before the use of vessels for pelagic sealing; but not a right to go out and engage in pelagic sealing.

The President. — Do you not think it very difficult to draw a legal line of limitation between what an Indian is allowed to do for himself, and what he may be allowed or permitted to do in the service of a European or civilized man?

Mr Carter. — There are always practical difficulties connected with dealings with barbaric tribes — greater or lesser difficulties — but not insuperable difficulties connected with it.

My friend evades the point, — does not even appreciate the point. It is not a question of there being greater or less difficulties in dealing with barbaric tribes — it is the question whether it is not difficult to draw the legal limitation between what is admitted to be a thing that the Indian may do for himself, according to his barbaric methods, and what he may do if employed at the instance of civilized man. The learned President recalls my friend to the question with this observation :

Do you find that there is a substantial legal difference between the two cases?

Mr Carter. — There is a substantial one.

The President. — Between the case of an Indian fishing on his own account, and an Indian fishing on the account of a civilized man?

Mr Carter. — I think there is a very substantial one.

The President. — A substantial legal one?

Then we get to that broad ground which is always the refuge once we are trying to bring these vague, undeterminate propositions to the touch of legal principle.

Yes,

says Mr Carter,

when I speak of “ legal ” I mean moral. We are on international grounds — international law, and there is a sharp distinction.

The President. — Moral and international are different fields of discussion, I think.

Mr Carter. — I said “ there is *no* sharp distinction ”.

Sir Charles Russell. — Very well — “ there is no sharp distinction ”. I take it so. That is to say, being in the field of international law, there is no sharp distinction between moral and legal law — that is the proposition, therefore, of my friend.

Mr Carter. — It is.

Sir Charles Russell. — Yes, I know. Then the learned President continues :

Moral and international are different fields of discussion, I think; but they may often join.

Mr Carter. — They are not so different as may be supposed.

The President. — They are not contrary.

Mr Carter. — Oh no, international law rests upon natural law, and natural law is all moral.

The law of nature is all moral, and it is the great part of international law.

Here we get back to that same fallacy which I have endeavoured to expose in a few sentences, and to which I must recur at a later period a little more fully — that fallacy which lies at the basis of these proposals — that if you can make out to your private satisfaction that a thing is against morals, or against the law of nature (whatever the law of nature means in the connection in which it is used) it is therefore against international law : it is therefore to be reprehended. With great deference to this Tribunal the distinction is justly, accurately, and truly drawn, in that observation of the learned President in which he said, « Moral and international law are two fields of discussion, but they may often join », which is to affirm in another way the proposition to which I invited, without any fear of the result, the assent of this Tribunal, namely that while moral law enters largely into the conception of international law — largely tends to the formation of international law — yet only so much of moral law as international law has taken up into and embodied in itself can be referred to in a discussion of lawyers and of judges as forming international law at all. But I do not end this discussion here. My friend Mr Carter, then proceeds, it having been pointed out to him by Lord Hannen that the mode of hunting pursued by the natives was not confined merely to their sustenance, but that they were the suppliers, in the first instance, of the skins of these wild animals — fur-seals and others included.

Mr Carter quite candidly says :

That is true. They were the original traders, and they were made use of by the purposes of commerce, but what I mean to say is, that was *commerce*.

Lord Hannen. — Yes, carried on by the natives.

Mr Carter. — I know, but that was commerce. They were supplying the commerce of the world. They were not supplying themselves with clothing — they were not furnishing themselves with seals for food.

The President. — That you would consider was legal at the time, but would not be legal now.

Mr Carter. — Before the Russians discovered these regions they were inhabited by Indians, and these Indians did pursue seals in that way. It is a pursuit by barbarians without method — without making any effort to preserve the stock; destructive, of course, in its character, but not of sufficient extent to endanger the existence of the race of the animal.

Then on the next page, page 477, my friend said;

The distinction which I mean to draw is a distinction of a resort to the seals for the purpose of the personal use of the people, such as they were in the habit of making before they were discovered by civilized men — the distinction between that pursuit and that which is promoted by civilized men for the purpose of supplying the world with these skins. That is the distinction. The first pursuit which is confined to the barbarians is not destructive of the stock. Nor is the other, as long as it is limited to certain very narrow proportions and conditions.

Well, the whole legal proposition is given away in this discussion. Then my friend continues : —

But when it is increased then it does threaten the stock. What must you do then? You must adopt those measures which are necessary to preserve the stock;

and what are the measures which society always employs for that purpose? I have detailed that already — it is to award the institution of property.

Now, did ever an able man present so inconsequential an argument as that to a Tribunal of intelligent judges? It is said : “ The Indians had a right to pelagic sealing : They had a right to it, and they carried it on even for the purposes of commerce : Civilized men carried it on, but carried it on only to a small extent, and they had a right to carry it on to a small extent so long as it did not affect the stock : But when it begins to affect the stock then rights change — that which was a right the day before ceases to be a right the day after that event begins to happen ” ; and this Tribunal is asked to do what? — Not to declare what the property rights had been and were, but is (to use the language of my friend), *to award the institution of property*. I say that it is not the function of this Tribunal — it is a misconception of the function of this Tribunal to address any such argument to it.

Mr Carter. — I observe you did not read the whole.

Sir Charles Russell. — I did not, indeed; there are a great many hundred pages of it. If there is any further passage you desire to be read, I will read it with pleasure.

Mr Carter. — I said you did not read the whole of what you were upon.

Sir Charles Russell. — The whole of that sentence? It is this :

It is, to award the institution of property. Now, must society withhold its effort, — must it forbear to employ those bounties —

Mr Carter. — “ Agencies ” would be a better word.

Sir Charles Russell. — Very well.

because here are a few hundreds of Indians in existence who may have some rights in reference to them? No, they are not to be considered, surely. We cannot allow this herd of seals to be extinguished just for the purpose of accommodating a few hundred Indians upon that coast, — surely not.

Then, if I go on, I shall have to go on for some distance. Is there anything more you want me to read?

Mr Carter. — I do not wish you to read anything ; but when you do undertake to do it, I would read the whole of it if I were you.

Sir Charles Russell. — I will read to the end of the page, because I think the subject there ceases.

The President. — It may be that the civilized fishermen may not be more than a few hundred also. The number of men employed is not absolutely a foundation of legal discrimination, — a legal duty.

Mr Carter. — You mean those employed on the Pribilof Islands may be a few hundreds?

That was really not the point of the question.

The President. — I mean, the pelagic sealing may be carried on by a few hundred Indians, but that is no matter. The difference that you make is whether they are Indians or civilized.

Mr Carter. — Yes.

The President. — Suppose Indians make commerce, selling or bartering their skins, — you allow that also?

Mr Carter. — Where it is not destructive.

The President. — It is a question of proportion, — of measure with you.

Mr Carter. — If it is destructive, then it is not to be allowed. They have no right to destroy the race of animals.

The President. — In order to give you satisfaction, the question would be to know within what limits pelagic sealing may be carried on without being destructive.

Mr Carter. — Yes, that is practically the question. If you say pelagic sealing can be carried on without being destructive.

The President. — By Indians, at any rate?

Mr Carter. — By Indians in their canoes in the way in which it was originally carried on. That does not threaten the existence of the herd.

The President. — That is a natural limitation.

Mr Carter. — But it is possible to do this. It would be possible for those who are now engaged in pelagic sealing: for instance, to say: “The Indians are permitted to carry on pelagic sealing; we are prevented from doing it. We will just employ those Indians”.

The President. — That is the difficult point which I just hinted at.

Now, I think I have read as much as will make clear the view that is there put.

Again my learned friend in another part of his argument said. “We affirm that the property in these seals is as clearly the property of the United States as a ship belonging to the United States.” Well, it does not do to carry these illustrations too far; but really this does suggest itself to one’s mind. My learned friend says a seal is as much property as a ship. Let us suppose a fleet of ships. It would be a very curious result that a fleet of ships was the property of the United States, but that the individual ships were not the property of the United States, if the parallel of the property in the seal and in the ship is so complete as my friend would seem to suggest.

EXAMINATION OF THE NATURE AND HABITS OF THE FUR-SEAL

But I approach the matter a little more closely. What kind of animal is this? To what order of animal is it to be relegated? I do not care whether it is to be called a “fish” or an “animal”, or what it is to be called: — what is it? If an animal, is it a land animal; or is it a sea animal? Well, I observe, in passing, that all through the legislation of the United States the seals are always spoken of in relation to “Fisheries”. But that may not be very important. What are its natural appliances for living on land? Can it progress on land with facility? Does it get its support from land; or any of its support from land? No. The animal is one which Nature has not adapted for easy progression on land. It has got no legs; it has got no feet. It can flop, with great rapidity, for a few yards, 50 or 60 at the outside, and then it falls down exhausted; and a curious circumstance in relation to it is this, that it is manageable on land because it is wholly helpless upon land, and

has not been furnished by Nature with appliances which enable it easily to progress upon land.

In this connection, I would like to read one passage from the Report of Mr Elliott in 1890, describing the character of this animal when it is being driven on land. I am reading from page 7 of his letter to the Secretary of the Treasury published with that Report. It is the third paragraph on that page.

The least reflection will declare to an observer that, while a fur-seal moves easier on land, and freer than any or all other seals, yet, at the same time, it is an unusual and laborious effort, even when it is voluntary; therefore, when thousands of young male seals are suddenly aroused to their utmost power of land locomotion, over rough, sharp rocks, rolling clinker stones, deep loose sand, mossy tussocks, and other equally severe impedimenta, they in their fright [This is the *domestic* animal] exert themselves most violently, crowd in confused sweltering heaps one upon the other, so that many are often "smothered" to death; and in this manner of most extraordinary effort to be urged along over stretches of unbroken miles, they are obliged to use muscles and nerves that nature never intended them to use, and which are not fitted for the action.

This prolonged, sudden, and unusual effort, unnatural and violent strain, must leave a lasting mark upon the physical condition of every seal thus driven, and then suffered to escape from the clubbed pods on the killing-grounds; they are alternately heated to the point of suffocation, gasping, panting, allowed to cool down at intervals, then abruptly started up on the road for a fresh renewal of this heating as they lunge, shamble, and creep along. When they arrive on the killing-grounds, after four or five hours of this distressing effort on their part, they are then suddenly cooled off for the last time prior to the final ordeal of clubbing; then when driven up into the last surround or pod, if the seals are spared from cause of being unfit to take, too big or too little, bitten, etc., they are permitted to go off from the killing-ground back to the sea, outwardly unharmed, most of them; but I am now satisfied that they sustain in a vast majority of cases internal injuries of greater or less degree, that remain to work physical disability or death thereafter to nearly every seal thus released, and certain destruction of its virility and courage necessary for a station on the rookery, even if it can possibly run the gauntlet of driving throughout every sealing season for five or six consecutive years; driven over and over again as it is during each one of these sealing seasons.

Therefore, it now appears plain to me, that those young male fur-seals which may happen to survive this terrible strain of seven years of driving overland, are rendered by this act of driving wholly worthless for breeding purposes — that they never go to the breeding-grounds and take up stations there, being utterly demoralized in spirit and in body.

This is also to be found in the British Counter-Case, at page 264.

Now, Mr President, it will probably occur to you or to some other Members of the Tribunal, though we have heard a great deal of the inhumanity in relation to pelagic sealing, yet that probably, if the seal could have its choice whether it would have itself knocked on the head on the island after these renewed and protracted efforts of cruelty, as one alternative, or would take its chance of being shot in its natural element as the other, if it is half as intelligent as my learned friends in other portions of their argument assert it is, there can be very little doubt which the seal would choose. I am dealing with this, not for the purpose of attacking the management of the Islands, but for the purpose of citing the man vouched by the United States as a great authority on the seal question.

Mr Carter. — Where is that vouched for?

Sir Charles Russell. — Again, and again, and again; and I will refer to the American authorities and executive officers of the American Government who have referred to Mr Elliott as a great authority, one or more of them indeed referring to him as the only authority on sealing.

Mr Carter. — You do not refer to anything in the evidence before the Court.

Sir Charles Russell. — I do indeed. Mr Blaine's letters, among others, refer to Mr Elliott as the great authority on seal life; and I have certainly many other references.

I was upon the point of showing what the character of this animal is — that its helplessness on land arises from the fact that it is not really a land animal. On the contrary, it is admitted that upon the sea it is at home: that it is capable of easy progression many miles in a day, without any unusual strain upon its vital powers.

Now does it get its sustenance from the land? Not at all. It gets no sustenance from the land, and perhaps the passage I am now about to read on the question of what it does feed upon, may suggest to this Tribunal that if the fur-seal does perish from the face of the earth, as the buffaloes have perished from the face of the earth so far as American possessions are concerned, it will not be an unmixed evil. On page 72 of the same book to which I am now referring, and referring only for this purpose, there occurs this description of the food of these animals.

Lord Hannen. — I see it is in inverted commas. What is it quoted from?

Sir Charles Russell. — It is a quotation from Mr Elliott's earlier Report of 1874.

Think of the enormous food consumption of these rookeries and hauling grounds; what an immense quantity of finny prey must pass down their voracious throats as every year rolls by.

A creature so full of life, strung with nerves muscles like bands of steel, cannot live on air, or absorb it from the sea. Their food is fish, to the practical exclusion of all other diet. I have never seen them touch, or disturb with the intention of touching it, one solitary example in the flocks of water-fowl which rest upon the surface of the water all about the islands.

I was especially careful in noting this, because it seemed to me that canine armature of their mouths must suggest flesh for food at times as well as fish; but fish we know they eat. Whole windrows of the heads of cod and wolf fishes bitten off by these animals at the nape were washed up on the south-shore of St. George during a gale in the summer of 1873. This pelagic decapitation evidently marked the progress and the appetite of a band of fur-seals to the windward of the islands, as they passed into and through a stray school of these fishes.

So apparently they destroyed a great deal more than they actually consumed: they bit the fish at the nape of the neck, the choicest part, and let the rest go.

Senator Morgan. — Do you remember if any other witness besides Mr Elliott has ever spoken of that fact.

Sir Charles Russell. — I think every writer has spoken of the enormous consumption of fish.

Senator Morgan. — But the partial consumption by biting off the heads at the nape of the neck.

Sir Charles Russell. — I am not aware; it may be, but I do not know.

Senator Morgan. — I think he drew on his imagination for that.

Lord Hannen. — Yes, but he does not say that. He simply says their heads were bitten off. It does not show that some were bitten slightly and escaped. They probably reject that which they do not like.

Sir Charles Russell. — I take it to mean that they ate the choicest parts.

Lord Hannen. — But you added to it that some escaped. There is nothing in Elliott's Report about that,

Sir Charles Russell. — No, I did not think the Senator meant that. I think I am right in saying that it is well known that otters, frequenting salmon rivers, will if fish is plentiful simply eat the back of the neck of the salmon and not eat the rest. That is an experience probably all of us who know anything about otter hunting are quite aware of.

How many pounds *per diem* is required by an adult seal and taken by it when feeding is not certain in my mind. Judging from the appetite, however, of kindred animals, such as sea-lions kept in confinement at Woodward's gardens, San Francisco, I can safely say that forty pounds for a full grown fur-seal is a fair allowance, with at least ten or twelve pounds *per diem* to every adult female, and not much less, if any, to the rapidly growing pups and young "holluschickie." Therefore, this great body of four and five millions of hearty, active animals which we know on the seal islands, must consume an enormous amount of such food every year. They cannot average less than ten pounds of fish each *per diem*, which gives the consumption, as exhibited by their appetite, of over six million tons of fish every year. What wonder, then, that nature should do something to hold these active fishermen in check.

Mr Carter. — He revises those observations on page 307, I see.

Sir Charles Russell. — I am obliged. I will refer to it with pleasure. I had not noticed it.

Mr Carter. — It begins in the middle of the page at the words "Using the above as a suggestion".

Sir Charles Russell. —

Using the above as a suggestion, several writers have hastily assumed that it would be a good thing if the seals were exterminated — that by exterminating them, just so much more would be given to our salmon and cod fishermen to place upon the markets of the world. These men forget the fact that all animal life in a state of nature existing to-day as the fishes and seals do is sustained by a natural equilibrium, one animal preying upon the other, so that year after year, only so many seals, so many cod, so many halibut, so many salmon, so many dog-fish, and so on throughout the long list, can and do exist.

That is dealing with the state of nature.

Mr Carter. — But it goes on.

Sir Charles Russell. — Very well. my learned friend, Mr Phelps,

will refer to it if it is important. I referred to him not for the purpose of shewing the food they consume, but for the purpose of shewing they were sea animals. So much therefore as to being fitted for land and deriving no food from land; and so far as we have progressed, it stands thus, that as regards formation, as regards the food on which they live, as regards the element in which they move most easily and most naturally, they are sea animals — free swimming sea animals. These facts have some legal bearing. It is said that this sea animal is a domestic animal, or that it is to be relegated to the category of domestic animals; I have pointed out already in my opening observations that this is the first time that such a proposition has ever been advanced in the history of the world, and I have to point out that if I am right in saying that it is a free swimming sea animal, and if I am also right in pointing out that for the greater part of its existence (I will come to the justification of that in a moment) it spends its life in what I have called its natural element, in which not only no authority is exerted over it, but no authority can be exerted over it, then I say it belongs, so far as legal assertion of property in it is concerned, exactly to the same category (though the difficulties are even greater in this case) as the birds of the air or any fish or free swimming animal in the ocean. My learned friends, on the other hand, say it is to be relegated to the same category as cattle on the plains — the boundless prairies of the American Continent.

My learned friends, surely, did not suppose that we were ignorant of what is the legislation in the United States, and in each of the States I believe, upon the subject of cattle on the plains: that there is a regular system there of branding each individual member of the herd; that these branded marks are the subject of legislation, and are required to be publicly announced, publicly advertised, or, as we should say, registered, so that the trade-mark of one man may be distinguishable from the trade-mark of another man; and, I speak subject to the correction of my learned friends, I think it will be found that, even in the case of cattle on the plains, which admittedly belong to the category of domestic animals, if these branding marks are omitted, or are not registered, there is very great difficulty in the owner, who seeks to claim them, establishing his right of property at all.

Now, it is said that these animals resort to the Islands to breed, and resort there in compliance with what has been picturesquely described as the “imperious instincts of their nature”. They do.

And when they get there, what do the representatives of the United States do? Can they do anything to improve the breed? Nothing. Do they make any selection of sire and dam, of bull and cow? Indeed, could they? No. What do they do? They do two things, one positive the other negative, and two things only. The positive thing is that they do what a preserver-game does; he has a gamekeeper to prevent poaching; they have people on the Islands to prevent raiding. The negative thing that they do is that they do not kill all. They knock on the head a

certain number, but exercise a certain amount of discrimination or a large amount of discrimination. That is the whole sum and substance of what they do, no more, no less.

Let me illustrate my meaning. Suppose the existence, which there may well be in some undiscovered region, of an Island where there are seals; what does the United States do on the Pribiloff Islands that Nature, unassisted, does not do on the undiscovered Island?

The only thing that Nature does not do is that she does not knock them on the head. Therefore, as they do nothing to bring the seals there, so, when the seals are brought there, they do nothing in regard to them to improve their stock or to increase their stock; and except for the control, whether effective or not I do not care, by which raiders are kept off by the representatives of the United States, or of the lessees, upon the Islands, they do nothing, except the negative act of not knocking some of them on the head, exercising, with regard to killing, as I have said, a certain amount of discrimination.

Do they do anything to induce them to go there? No, they do not. On the contrary, if they were to attempt by any kind of artificial means to provide for the reception of the seals, it would have the effect of driving them away, not of inducing them to come. Unlike the case of the bees, — the wild hive of bees, for which the man desiring that hive provides a mechanical contrivance, and also the beginning of a supply of food for them to induce them to form their combs of honey, — unlike the case of the doves, for which the owner supplies food and a dovecote where they get shelter from the weather, the owners of the Pribiloff Islands do nothing; and if they were to do anything, it would have the effect of repelling rather than of inducing them to come.

Now, let me go a little further. It is said that they come to the Islands, and I think I must refer to the very words in which this is put, — I could not do justice to the pathetic language used in the case if I did not read it, — it is said, not only do they come to the Islands, but that they “voluntarily submit themselves to the control of man”, and have entered into a kind of treaty (“pact” I think is the actual word used) to yield up a certain proportion of their skins in consideration of the protection that man affords them and in return for it. Let me read it, so that it may not be said I am doing an injustice to this passage. I read from page 92 of their Argument.—

In the added light thrown by this inquiry into the foundations of the institution of property the case of the fur-seal can be no longer open to doubt, if it ever was. It is a typical instance.

Now, this is the sentence which I desire to read.

Polygamous in its nature, compelled to breed upon the land, and confined to that element for half the year, gentle and confiding in disposition, nearly defenceless against attack, it seems almost to implore the protection of man, and to offer to

him as a reward that superfluity of increase which is not needed for the continuance of the race.

The other passage to which I wish to refer, where the phrase is used, is on page 47.

The Alaskan fur-seals are a typical instance for the application of this doctrine. They are by the imperious and unchangeable instincts of their nature impelled to return from their wanderings to the *same place*; they are defenseless against man, and in returning to the same place voluntarily subject themselves to his power, and enable him to treat them in the same way and to obtain from them the same benefits as may be had in the case of domestic animals.

Now, what is the meaning of that phrase, “voluntarily submit themselves to his power”? Does it, in fact, mean more than that they come to the Islands and breed, and that, being on the Islands to breed, they can be the more readily knocked on the head? But, in the sense of saying that they do voluntarily and of their own free-will submit themselves to the control of man, the idea is absurd on the face of it and it is unsupported by facts. They come, “by the imperious necessity of their nature” (if I am to adopt that rather grandiloquent expression, which I am willing to do), to breed on the Islands; they are in a position in which man can readily knock them on the head; but it is absurd to say that they come to the Islands to submit themselves, or that they do submit themselves, voluntarily, by the exercise of any volition on their part, to the control of man, in the same sense of the word as domesticated animals undoubtedly do.

They submit themselves to the control of man just in the same sense, and in no other sense, as they submit themselves to the control of the killer-whale when they go out into the sea where the killer-whale can catch them. They are safe from the killer-whale on land; but they are obliged, “by the imperious instincts of their nature”, to return to the sea, and there they return to a place where they are exposed to the ravages of the killer-whale; and it would be as true to say that they *voluntarily* submit themselves to the ravages of the killer-whale as to say that by resorting to the Islands they *voluntarily* submit themselves to the control of man. You might as well say the turtle, that comes to deposit its eggs in the sand to be hatched by the rays of the sun, coming upon the land indeed “by the imperious and unchangeable instinct of its nature” submits itself to the control of man because man may take advantage of the opportunity to knock it on the head; or, as my learned friend reminds me, may begin by turning it on its back and keeping it on its back a certain time before it is knocked on the head.

Then the next thing said is this; they have, by this imperious and unchangeable instinct of their nature, the *animus revertendi*. And then the

United States say they constantly come back to us, and even
; *Animus revertendi*. if we do nothing to domesticate them, even if we cannot found a property in them *per industriam*, even if we do nothing to induce them to come there or to give them this habit of returning, yet the fact of

their coming back gives us a property interest. Now, with great deference, this is an entire misconception of the doctrine of *animus revertendi*. First of all, I know of no case, and my learned friends have cited none, in which this doctrine has ever been applied to the case of migratory animals.

Could it be applied for instance to the wild ducks that breed in the northern parts of the Canadian territory and come down at a different season to the south, afterwards returning to the north? There is no case that I am aware of decided on this doctrine of *animus revertendi*, or which has any reference even to it, unless the habit or custom of returning operates after a short interval calculated by hours, or perhaps by days. As truly might you say that there was the *animus revertendi* to the ocean as an *animus revertendi* to the Pribylof Islands. When you get an animal which spends half its life in one place and half in the other, I think it will be found that this doctrine of *animus revertendi* has no bearing on the question.

But there is another ground on which the reference to this doctrine has been entirely misconceived. There is no case that I am aware of, and I speak subject to correction, but certainly none has been cited, where *animus revertendi* has been referred to in connection with the right of property, except where the *animus* has been induced by the effort or industry of man.

Where the instinct belongs to an animal and it acts according to its influence, where man has nothing to do to get it to return, where man has nothing to do to foster that return, where man has nothing to do to induce it to return, as by providing home or food, the doctrine of *animus revertendi* has no application. And I may illustrate my meaning I think in a sentence. I will take three or four well known classes of animals : pheasants, rabbits, grouse, hares. Let us see what happens in each of these cases.

What does the man who raises pheasants begin by doing? He begins by stealing the pheasants' eggs out of the nest in order to induce the hen pheasant to lay more eggs; and, having done that, he proceeds to hatch the eggs he has abstracted under a common barn-door hen. When the birds are young he feeds them, and when they are old he feeds them. They spend a great part of their time on his land, but they make excursions to adjoining land which is not his, and they return to his land because they expect to be fed there.

Take again rabbits : you have a warren in a sand-hill on your estate, which supplies very little food indeed to the rabbits, but which gives them every facility for constructing their houses or burrows in the sand. They go elsewhere, it may be to another estate of yours, it may be upon your neighbour's estate, in the dead of the night, or early morning, for their food; and then they come back to your warren. They have, by the imperious and unchangeable instincts of their nature, the *animus revertendi*.

And with grouse almost the same thing happens.

So with wild deer. One may multiply the instances. These animals all have the *animus revertendi* : but has any law ever said, though there are cases in which you actually induce them to return by making them homes, and even by giving them food, that your neighbour, when they are off your land, may not shoot them as wild animals. No : no case has ever said anything of the kind. No case ever could say anything of the kind.

I go a little further. It is stated in this case, — and I am at present engaged, as the Tribunal will see, not in building up an affirmative argument, but in examining and analysing the argument put by the other side : taking it to pieces, as I hope successfully — it is said in the case, and was repeated, to my amazement, by Mr Coudert, if not also by my learned friend, Mr Carter, that when the seals were on the island they were the complete and absolute property of the United States or their lessees.

Thereupon Senator Morgan very astutely put the question : if they are the absolute property of the United States or their lessees when they are on the islands, when do they cease to be their property, and how do they cease to be their property, — a very proper question indeed. But there is much virtue in an “ if. ” “ If ” they are their property on the islands, they are their property off the islands. But my learned friends have utterly failed to grasp — I see no trace of it in the whole of the argument, written or oral, — the distinction between the right to take a thing when it is on your land, from which land you can exclude everybody else, and an absolute right of property in the thing itself. Surely it is a legal conception capable of very ready and easy apprehension, recognized by all systems of municipal law, in all civilized countries, that on the land you have a right to exclude everybody else : you have a right to treat that somebody else as a trespasser. It follows from that that you have the right to take what is on the land, even though it be wild ; and the right to exclude others from the opportunity of taking it. But it follows also, that when the wild animals are off your land your exclusive right ceases. Thus it is that the owner of the land has a special right by reason of his right of ownership, of taking the wild animals on his lands : the right known as *resort*^{so li.}. This fundamental principle I find no trace of in the argument of my learned friend ; but it is a principle which it is impossible to ignore. It is very essential to be borne in mind in this case.

land indeed “ by ” at the question again by the light of an application submits itself to the Court’s doctrine of property in seals. What does it import the opportunity to knock the consequences of it? It imports this, that if they minds me, may begin by saying they are property everywhere ; and herein a certain time before it is my learned friend Mr Carter (one of my few

Then the next thing said (aid) that once you establish the right of pro-changeable instinct of their nature are in possession, even though you have

United States sovereignty over the thing.

: *Animus revertendi*.

if we do nothing if you once have it, if it escapes out of found a property in them *per indu* property in your sheep or horse, or in them to come there or to give them have an absolute right of property,

because it may have strayed miles, even hundreds of miles, away; and therefore if there is property in these seals the property attaches wherever they are.

Senator Morgan. — A case of constructive possession.

Sir Charles Russell. — Quite so. That is a convenient expression.

But that is only where you have the property in the same sense, to use Mr Carter's illustration, as you have property in a ship. What consequences does this lead us to? It leads us to those absurd consequences from which my learned friends most naturally seek to escape, but from which they cannot escape, namely, that if there is property on the Islands there is property a thousand miles away from the islands. And one might invent, or one might imagine, a colloquy between a representative of the lessees of Pribilof Islands and a pelagic sealer off Cape Flattery. The pelagic sealer is about to shoot a seal which he sees there, and the agent of the lessee says: "No you must not, that belongs to me". "Well, when did you see it last?" "Well I do not know that I ever saw it before." "How do you know it is yours?" "Well I cannot be quite certain that it is mine. I have no mark upon it, but I think it comes from the Pribilof Islands". "You say the property is yours. Do you say that that particular seal is yours?" Well I cannot quite say that; it is not necessary that I should say that; but it belongs to a lot of seals; we call them a herd, — though I cannot quite undertake to say that particular seal is mine I am pretty sure it is one of a lot of seals that probably came from the Pribilof Islands. You must not shoot him, because when he goes back, as I expect he will (I am not sure) by the imperious instincts of his nature, to the Pribilof Islands I intend to knock him on the head". I need not say the seal, not interested in this discussion, has meanwhile disappeared, and his life is so far prolonged. But does it not present the absurdity of the argument of property in the individual seal, so that as one may say, *ça saute aux yeux*.

Need I dwell upon the farther consequences, namely, that in defence of this property in the individual seals, or in the seal herd, it is claimed by the United States that they may search and seize ships that they believe to be engaged in pelagic sealing, and, if they make good the accusation, confiscate such ships?

Now let me just see whether the facts which I have so far mentioned as characteristic of this animal are not facts as to which there is no doubt or dispute. Is there any real dispute that the animal is a sea animal, a free swimming animal? Is there any dispute that it spends at least half of its time in the open sea? I think not. My learned friend, Mr Coudert, went the length of saying that it spent eight months of the year on the islands. Now that, upon the examination of the figures, will be found to be quite incorrect. It will be found that a much nearer approximation is from three to five months in the year, and the way in which the longer period has been arrived at has been by taking the date of the earliest arrival and the latest departure; but if you take the mean it will be found somewhere between four and five months, taking each class

of seal; the argument that we have put forward on this point, seems to be warranted by the figures given. It is not much more, if anything more, than a third of each year. So far, therefore, there is very little difference between us. I am not concerned however to demonstrate that the seal is a sea animal. Probably the true explanation is that it is partly a land animal and partly a sea animal, or in other words, what is commonly called " amphibious "; but that does not seem to be very important.

Is there any dispute about the other facts which are important on the question of property : that it gets no sustenance from land, there is no dispute as to that : or upon the fact that the lessees of the United States do nothing artificially to induce it to come to the islands, and that if they did try to do anything artificially to induce it to come to the islands, it would probably have a repellent effect. There does not seem to be any dispute about that.

Then what does it come to? It comes to this : that it is an animal which breeds on the islands, and resorts to the islands mainly to breed. That will be found to be, ultimately, the material fact in the controversy upon the question of property. But how about the character of the animal itself? Is it, or can it be called, a domestic animal?

Now I would like to refer to one or two points in this connection which I think are not unimportant. We have one instance given in the United States Case, where an attempt was made to tame a young seal, and I would like to refer to it as it is the only one I think that is given. The story is given on page 33 of the Second Volume of the Appendix to the case of the United States. It is the case of a pup called « Jimmie ». He was very short-lived. How he got his name does not appear; but the accident of his birth is mentioned at the beginning of the section :

Little « Jimmie », as this particular pup was called, was the child of adverse circumstances, as his mother happened accidentally to be caught in a large drive and could not be separated from the herd until the killing ground was reached.

Shortly after being parted out and allowed to go free, on her way to the water, she hurriedly gave birth to this pup and continued on her journey. The pup was watched carefully for a few days, and when it was thought to have been deserted a kind-hearted employé of the Company, Mr Allis, brought it into the village with a double view of trying to save its life as well as to make a pet of it.

For the first few days, as nobody could manage to make him eat, and as he would generally get the best of some friendly finger in these attempts at feeding he was let severely alone. Then followed various contrivances, mechanical and otherwise, for holding his head so as to feed him with a spoon or a nursing bottle, but all to no purpose, for he would get most of the milk everywhere but where it was intended to go. This went on for all of two weeks or more. I then equipped myself with a large syringe and a flexible tube and about a pint or so of warm fresh cow's milk. Little « Jimmie's » mouth was kept open, the tube was passed down his throat into his stomach, the syringe filled with milk, in quantity as before stated, and which was unanimously agreed was not too much for him at one feeding, was slowly injected down the tube into his stomach.

After the operation the tube was carefully withdrawn, and « Jimmie » was left to his own devices. The pup, much to the gratification and amusement of all present, immediately began to show in the most unmistakable manner the greatest of seal

delight, i. e. to lie down in the various positions of seal comfort, on his back and side, and wave and fan himself with his flippers, scratch himself, bleat, etc. As these signs were unmistakable to all present who were familiar with the habits of seals, the operation was thought to be a success. Up to the last time the pup was seen, late that night, he was doing finely, but next morning he was found dead, and I attribute his sudden taking off either to the small boy or an accident during the night ”.

I believe that is the best authenticated instance — the only one that I am aware of — of an attempt to domesticate the seal : the seal which we are told could be induced to follow you — which was semi-human in its intelligence — which kept appealing to you for aid and protection.

Now, Mr President, in this connection, I want to read one or two passages from the same volume. The first is at page 69, which expresses, very strongly, the domestic and gentle nature of this animal. I think it is the strongest passage of this character, and therefore I read it.

The name of the gentleman is Morton, who was the Agent of the lessees and Treasury Agent on the Pribiloff Islands, and he says :

I believe the American Government to be justified in assuming and maintaining the absolute proprietorship of the American seals. They may, I think, in the broad sense of the word, be regarded as domestic animals.

Well, I think it requires a very “ broad sense ” indeed. Then he proceeds :

They certainly possess qualities of a domestic nature which are susceptible of a high degree of development. During the first two or three months of their lives they are as gentle and docile as most domestic animals :

Well, “ Jimmie ” was not.

They may be handled and petted, will accept food at one’s hands :

“ Jimmie ” would not.

can be taught to follow one from place to place, and in various ways are amenable to intelligent guidance and training. Even at mature age they are subject to as much control as are sheep or cattle.

They may be driven here and there at will; may be separated and driven together again; divided into groups or “ pods ”, great or small, or be herded by thousands with less effort and trouble than bands of cattle are herded on the plains. They are far from possessing that excessive timidity which has been popularly attributed to them. They soon grow accustomed to the sight of man, and in the absence of offensive demonstration on his part quickly learn to regard his proximity with indifference.

Now I have read that passage because it is the strongest that I could find as to the general statement of the domestic character of this animal. Now let me contrast it with a passage which shews what is the true character of these animals, how frightened they are of man, and what efforts they will make to escape from human control. I turn to page 162, and I wish to point out that the statement which this witness makes is for the purpose of shewing the enormous vitality, as he conceives, of

the seals — their enormous powers of endurance and vitality. About the middle of page 162, you will find this. —

I never saw or heard of a case where a male seal was seriously injured by driving or redriving.

Then he proceeds to say how they fight on the rookeries, receive wounds, and yet are full of vigour.

Now the next passage I wish to read is this :

To show the wonderful vitality of the male seal, I will give one instance which came under my own observation : A drive of about 3,000 bachelors had been made, and after going a short distance was left in charge of a boy ; by his negligence they escaped from his control, and the whole number plunged over a cliff, falling 60 feet upon broken stones and rocks along the shore. Out of the whole number only seven were killed, the remainder taking to the water ; and these seven met death, I believe, from being the first to go over and the others falling upon them smothered them.

These are the animals which are easily handled, but which, actually, in order to escape from man, will jump down a cliff sixty feet, pell-mell, helter-skelter, upon the top of one another ; and yet they are said to be so easy to control that you may drive them and round them up as you would round up cattle upon the plains.

I may of course be misapprehending the effect of this passage. If so, I should be very glad to be corrected and put right ; but to say that an animal which will expose itself to the terrible risk of loss of life and serious injury by jumping down a cliff sixty feet high, which will rush wildly away, wholly regardless of the consequences to itself, from the attempt of control of man, is not manifesting timidity in the presence of man seems to me very difficult to understand and appreciate. I may not understand this statement rightly. If I do not understand it rightly, the judgment of the Tribunal will set me right, or my learned friend Mr Phelps, when his time comes ; but I can myself suggest nothing which more strongly points to the timidity, of the animal, and its fear of man, than the fact that in its endeavor to escape it will attempt to perform acts such as these, which it must be apparent, even to its limited intelligence, are fraught with personal injury and danger to themselves. He says seven of them were killed, he cannot tell how many more, for they may have been so injured that death may have resulted as a consequence.

Is there anything else, when you come to facts, which shows any capacity to control or domesticate the seals ? I know of nothing ; but not only that, I know of a fact which renders complete domesticity impossible, and that is that if you attempted to keep these animals under control and on the land, they would inevitably die. Therefore the case is stronger than that of most wild animals ; because, as regards many wild animals, you may keep them under such close confinement, and in such close custody, and under such close physical control on the land, as to preserve the opportunity of knocking them on the head or cutting

their throats whenever you like; but you cannot do that in the case of these seals, because if you confine them or even attempt to keep them under your control on the land, where alone you have any means of exercising power over their motions or their directions, you kill them. It is by the "imperious necessity of their nature" that they must go to sea.

So far as I have yet gone, it seems to me that all these facts that I have dwelt upon are common ground; that there is really no difference about the facts, so far as I have dealt with them; and that, in my judgment, for the reasons I shall presently give, they are conclusive upon the question of property. But there are one or two other facts which

I think it is important to ask the Tribunal to regard, The question of intermingling of the "herds". which I cannot say are admitted facts, but as to which I

can only say that there is a body of evidence in regard to them. The first that I refer to is the question of intermingling of the seals frequenting the Pribilof Islands with other seals from different places. That is established principally by reference to the character of the skins of these animals; and I wish to point out how the evidence stands in relation to this question of pelage.

The consignments of the Commander and Copper skins, which are from the Russian Islands, come by different routes to those who deal with them in the way of commerce in London. The consignments from the Pribilof Islands, equally, are a separate consignment, and reach the market as a separate consignment. And thirdly, there is the Northwest catch, which is the name used to describe the pelagic catch. That again finds its way to the market by a different route, through different agencies, and as a separate consignment. It appears to be undoubted that the Alaskan fur-seal skin has attained a higher reputation in the market than any other fur-seal skin. Whether that is partly owing to the fact that it is the oldest fur-seal known in the market, or whether it is that the name has become attached to a skin of a particular quality, or partly one and partly the other, I do not quite know; but if I am able to show that in each of these consignments there will be found to be a mixture: in the Alaskan consignment an admixture of Copper and Commander skins, and in the Copper and Commander consignments a mixture of Alaskan skins, and in the Northwest catch a mixture of both: and in all—which is to me the most singular fact—a large percentage of skins approximating to the character of Alaskan skins, or approximating to the character of Copper and Commander skins: then I think it is impossible to resist the conclusion that there is a much wider intermingling, and not only intermingling but interbreeding, in the seal family in this part of the North Pacific than is admitted by my learned friends on the other side.

Senator Morgan. — I believe there is no doubt that expert witnesses can certainly trace the distinctions between these different skins of different islands. You have no doubt on that point?

Sir Charles Russell. — You will see, Sir, what it leaves no doubt upon

when I call attention to the evidence, which I propose to do in a moment or two. This fact, if it be the fact — I am not treating it as an admitted fact at all; on the contrary it is denied — but this fact, if it be a fact, of intermingling and interbreeding is only what you would expect. It is a thing you would probably look for; because here at least we are on common ground, namely that the seals wherever they are found, whether in the Northwest Catch or the Russian Catch or the Alaskan Catch, or along the Southern shores, are all of the same species. Therefore, there would be nothing unnatural, on the contrary there would be everything natural, in the fact of their interbreeding, if they intermingle. Then is there anything unnatural or improbable in the fact of their intermingling? No. If the evidence which I shall call attention to in a moment is well founded, it will be seen that although there are two great divisions — one of which goes south east in its migrations, and the other goes south west in the autumn and winter —, yet that they are not two distinct armies, so to speak, in regular Indian file, following one another, but that they are scattered over the whole ocean in a greater or less degree: and that in point of fact there is no part of the ocean in which they are not to be found, and in considerable numbers, at any time during the period of their annual migration.

That again is what one would expect, for a very obvious reason. These are amphibious animals, that live upon fish, and upon fish only. They would, in the pursuit of their natural food, follow such variations as might be suggested to them by the pursuit of their food, the schools of fish being here at one time, and there at another time; and so this intermingling would be brought about.

Lastly, and this is the only other point in this connection which I wish to dwell upon, I think that it will be found to be an entire mistake to suppose, as is suggested on the other side, that during the breeding season the whole seal family make their way to the Pribilof Islands and to the Commander and Copper Islands, and that the whole family or whole families are there on or in the immediate neighbourhood of the islands during that breeding season. That will be found not to be the case. It will be found upon the evidence that even in the height of the breeding season, in the month of July and in the month of August, quantities of seals are to be found all over the seas — I mean at some considerable distance from the coast — as to which the probability is that a very large part of them are barren females, young bachelors, and old seals, that do not go to the islands at all; and that as regards the female seal, the evidence, even from the witnesses of the United States, is to the effect that from the moment she leaves the island in the autumn of the year in which she was pupped, she does not return to the island until the sexual instinct prompts her return there at two or three years of age, and that she does not return in any permanent sense to the island at all until she comes to deliver her first pup.

Those are points as to which I shall have to trouble the Tribunal with

reading some passages in the evidence. I think they have some bearing upon this question of property.

The Tribunal here adjourned for a short time.

The President. — Sir Charles, we are ready to hear you.

Sir Charles Russell. — I am now about to refer, Mr President, to the evidence of the intermingling, which, as I have said, is not an admitted fact. I have pointed out the reasons why I conceive it to be probable and natural. I will now call attention to the evidence which proves it; and in calling attention to that evidence, it will be found to answer the question addressed to me by Senator Morgan.

The President. — We should like, Sir Charles, for one moment, to refer to the English maps which give the course followed by the seals in general. We have the map in the Report of the British Commissioners, which illustrates the resorts and the migration routes of the fur-seals in the North Pacific generally; and we shall be able to follow you.

Sir Charles Russell. — I do not intend, Sir, to refer to the map, nor would it aid the Tribunal, in following my argument, to have it before them; I was upon the independent testimony as to the fact of intermingling.

The President. — Is there any contradiction between these maps and the others?

Sir Charles Russell. — I do not think there is any contradiction. The further Report of the Commissioners, in view of the further information that they have obtained, undoubtedly points to the fact that although there may be said to be two clearly marked main routes of migration south, yet that it would be incorrect to assume that the whole body of the seals are gathered into one or other of these routes — that there are still a considerable body of seals attached to neither route, but scattered over the whole sea from land to land. The point I was upon was the evidence that goes to show intermingling; and the same evidence will answer the question addressed to me by Senator Morgan as to whether or not it was possible to predicate, as to particular skins, whether they were Alaskan, or Copper, or Commander skins; and the answer will be found to be, that in some cases — in a great many cases — there are skins which they say are Alaskan without doubt; a great many which they say are Copper without a doubt; but there a great many also which they say are undistinguishable from either, and partake of the qualities and characteristics of both. That is the tendency of the evidence. It begins at page 230 of the second volume of the Appendix to the British Counter-Case; and it is the evidence of the same persons, or a great many of the same persons, whose evidence has been utilized by the United States for other purposes. I will only read what is absolutely necessary, and I will commence with the 6th paragraph of the affidavit of Mr Poland, in which he says :

In inspecting the shipments made through Messrs Lampson from the Pribilof Islands, I have from time to time noticed the presence amongst them of skins which were undistinguishable from Copper Island skins, and also in the same way I have

noticed amongst Copper Island consignments skins which are evidently of the Alaskan description. I have also noticed skins in both classes which in a lesser degree resemble the other class.

I dwell on this particularly, because my learned friend Mr Coudert was, as I conceive, rash when he said — “ It would be something if it could be shewn that Coppers were found amongst the Alaskans, or Alaskans amongst the Coppers. ” My friend, I think could not have had his attention drawn to this evidence.

Then on the next page — page 231 — is the declaration, in French, of Mr Leon Revillon. It is the last paragraph that I call attention to :

En examinant les peaux envoyées des Iles Pribilof par l'intermédiaire de Messrs Lampson de Londres, j'ai remarqué de temps à autre qu'il se trouvait parmi elles des peaux qu'on ne pouvait pas distinguer de celles venant de “ Copper Island ”, et j'ai également observé dans les envois provenant de “ Copper Island ” des peaux qui sont en toute apparence de la description de celles dites “ d'Alaska ”. J'ai remarqué aussi que dans chaque classe des peaux il y en avait qui ressemblaient dans un moindre degré à l'autre classe.

Now in turn to page 235, and will read paragraph 6 of the evidence of Mr Ince :

In inspecting parcels of skins from Pribilof Islands sold from time to time by Messrs Lampson, I have noticed amongst them skins of seals which I should have thought, had they not been there, were from the Commander Island skins, and, in the same way, in inspecting skins of Commander Island seals, I have noticed amongst them skins just like Alaskas, and, of course, in each class I have noted skins of the other class, but of a less marked degree of similarity.

Now on the next page is the declaration of Mr Sydney Poland; and in paragraph 6 he says :

In examining Alaska consignments from the Pribilof Islands sold by Messrs Lampson, I have noticed among these skins which, in my opinion, were absolutely undistinguishable from Copper Island skins, and in the same way I have found among skins consigned from the Copper Islands, skins which were undistinguishable from Alaskas, and of course also many skins in each class which in a less degree resembled the other class.

Then in paragraph 7 he says : —

In their dressed and finished condition it is exceedingly difficult, and to my mind impossible, to distinguish an Alaska from a Copper, and I assert that if half-a-dozen of each description manufactured into jackets were put before any dealer, however experienced, he would find it impossible to tell one from the other.

I read, next, from the declaration of Mr Lansdell. At the top of page 237, in paragraph 5, he says : —

I have found among the Alaska consignments sold by Messrs Lampson, skins which it would be impossible for me to distinguish from Copper Island skins were it not for the fact that they were in the Alaska catalogue, and also among Copper Island consignments I have found in the same way Alaskas.

Then at the bottom of page 237, Mr Jay of Regent Street, London says, paragraph 5, of his declaration.

In inspecting consignments from the Pribilof Islands sold by Messrs Lampson I have repeatedly observed amongst them skins which were to my mind undistin-

guishable from skins from the Copper Islands; and, in the same way, in inspecting consignments from the Copper Islands, I have noticed amongst them a considerable quantity of skins which I could not have distinguished from Alaska skins. I should not like to say what the percentage of these skins would be, but I should think that 25 to 30 per cent was probably a fair average.

The next is Mr Boulter, paragraphs 2 and 3, page 238.

The three best known descriptions of seal-skins are (a) the Alaskas, which come from the Pribilof Islands; (b) the Coppers, which come from the Commander Islands; and (c) what is known as the North-West catch.

I have carefully considered what difference there is between Alaskas and Coppers.

Then Mr Politzer, paragraph 2, is to the same effect. I will not trouble the Tribunal by reading that; but, in the next paragraph, paragraph 3, the top of page 239, he says :

I have noticed in inspecting the consignments from the Pribilof Islands skins (sometimes as many as 30 or 40 per cent) which were perfectly undistinguishable from Copper Island skins, and in the same way, in inspecting consignments of skins from the Commander Islands I have noticed skins which were similar to Alaskas, and of course in both classes I have found skins which in a lesser degree resemble the other class.

So again Mr Halsey speaks to the same effect. I will not trouble the Tribunal by reading each one of these.

So Mr Slater, on page 240.

So Mr Weber, on pages 240 and 241.

So Mr Jungmann, of Paris, and, in paragraph 4, you will see he says the same thing.

So Mons. Émile Hertz, of Paris; at the top of page 242, he says :

At the request of the Representative of Great Britain, I declare in addition thereto that I have from time to time seen among the consignments of Alaska seals offered for public sale by Messrs Lampson and Company, of London, skins resembling Copper Island skins, and among the consignments of this latter sort skins resembling the Alaska kind, but I believe it to be impossible to affirm absolutely that these doubtful skins belong to one or other of these two localities.

So Mr Grebert.

So Mr Haendler.

So Mr Eysoldt; who says in paragraph 5, on page 243.

In consignments that I have inspected from the Copper Islands, sold by Messrs Lampson and Company, I have noticed a certain percentage of skins which, had I seen them elsewhere, I should have considered them Alaska; and in the same way I have found skins amongst Alaska consignments that I have inspected which resembled the Copper description.

It is a matter of considerable difficulty to say what is the exact percentage I have so noticed, but I think it would be a safe estimate to say that, in the Copper consignments, I have found from 25 to 30 per cent, which resembled Alaskas, and in inspecting Alaska consignments about the same percentage of skins which resembled Coppers. "

So Mr Friedeberg, paragraph 4, page 244. He puts the percentage from 20 to 40 per cent.

So Mr Creamer, in paragraph 4; he puts the percentage at rather less, I think.

So Mr Stamp, whose evidence has been dealt with by Mr Coudert as perfectly reliable, and I have no doubt it is. He says in paragraph 3.

In my opinion, there is no absolute line of demarcation between the Copper Island skins and Alaskas; and in inspecting the consignments made each year from the Pribilof Islands through Messrs Lampson and Company I have found a certain percentage of skins which were *fac similes* of Copper Island skins; and in the same way, in inspecting the consignments of Copper Island skins, I have seen skins which, had I seen them elsewhere, I should have classed as Alaskas, and also a certain number of the intermediate degrees of similarity. The qualities of the skins vary greatly in different years; some years the Coppers approach in quality very closely to the Alaskas.

Then he speaks, in paragraph 5, about noticing females among the recent consignments.

So Mr Apfel, on page 246; but I do not think I need trouble the Tribunal with any more of this evidence.

Mr Henry Poland's statement is at page 250.

Now, unless I am mistaken, the Tribunal cannot fail to attach importance to this evidence, because it must be recollected that the case of the United States has been that, although they do not go the length of saying that the Alaskan fur-seal is a distinct species, yet they say that the seals that frequent the Pribilof Islands are a family of seals, of which no doubt there are other species in the Ocean, that keep their own society, that go on definite routes to the South, that go on definite routes to the North and make the Pribilof Islands their home. Well, of course, it is obvious that if these facts, which have been vouched by these gentlemen, are true, there cannot be any such distinction of family as they allege, and the more they assert a distinctive character for the Alaskan fur-seal skin, the more they assert that the Alaskan fur-seal skin is superior in character, by reason of the density of its fur, the stronger becomes the evidence of intermingling and interbreeding. If you find this large percentage of an entirely different set of skins mixed with the Alaskan, if you find a large class in this consignment where the qualities of the Copper and Alaskan approach one another, that is the strongest evidence that could be given not merely of intermingling but of interbreeding of these different branches of this species of the fur-seal.

There are one or two other points in that connection which I think it well also to notice; namely, that upon examination it will not be found that the theory presented of an annual migration north of what I may call, for brevity's sake, the Alaskan seal family, — north to the Pribilof Islands, — and a migration south of the same family, so that the southern resort of this fur-seal family would be vacant during the breeding season when the main portion of the family were on the Pribilof Islands, will not be found to be well established; and for that purpose I will refer the Tribunal to one or two points, not at any length, for I

am very anxious to get over the ground, to show that at all times of the year there are to be found (and my evidence will be principally directed to the months of June, July, August and September when the breeding season is all over) seals south of the Aleutians, and north of the Aleutians as well.

The first reference I shall make is to the Report of the British Commissioners at page 175, where there is set out a very interesting letter from a gentleman named Swan, who seems to have taken a great deal of interest in seals. He is a gentleman who lives at Port Townsend in Washington territory and is a United States judge in that neighbourhood.

Mr Phelps. — No.

Mr Justice Harlan. — He is not a United States Judge I think : if that be important.

Sir Charles Russell. — If I have done him an injustice I am sorry.

Mr Justice Harlan. — He may be a Judge in Canada.

Mr Tupper. — No he is not.

Sir Charles Russell. — Probably, Mr President, when each of these great countries disclaim him, the United States on the one hand and Canada on the other, the explanation is to be found in the fact that he is a collector of customs.

Mr Phelps. — No, he is the owner of a sealing schooner.

Mr Justice Harlan. — At any rate he is called a Judge.

Sir Charles Russell. — Yes. In my own justification I was going to say that I called him Judge because I found him called Judge. Perhaps it is because of his superior wisdom he has been so called by his friends and admirers. Let us assume that that is the understanding.

Sir John Thompson. — We may start with the understanding that Port Townsend is not in Canada.

Sir Charles Russell. — Yes, and that information is necessary for my learned friend Mr Phelps, because he inquired the other day.

Mr Phelps. — Yes, I have since found out.

Sir Charles Russell. — And I trust that the information we gave has been found accurate.

On the top of page 175 there is a good deal of abuse of the Lessees in various points of the Islands with which I will not trouble you, and he says :

The seals begin to make their appearance in the region about Cape Flattery in the latter part of December or the first of January, varying with different seasons. When easterly winds prevail with much snow they keep well off shore, and do not make their appearance in great numbers before the middle of February or the first of March. Last winter was very mild, with but little snow, but the prevailing winds, which were south and south-west, were exceedingly violent, preventing sealing-schooners from doing much hunting. The mildness of temperature, however, with the direction of the prevailing winds, drove the seals toward the coast in incredible numbers. They gradually work up the coast toward Queen Charlotte Island, when the larger portion of the herds move along the Alaskan coast toward Unimak Pass and other western openings into Bering Sea. A portion of these seals, however, pass into Dixon's Entrance, north of Queen Charlotte Island, and into Cross Sound

and Cook's Inlet, and do not go to Behring Sea, but have their young on the innumerable islands, fiords, and bays in Southern Alaska and British Columbia. These seals are seen in these waters all summer, at the same time of the breeding on the rookeries of the Pribilof Islands, and are killed by Indians and the skins sold to dealers. The great body of the seals, however, do enter Behring Sea, where they are followed by the sealing-vessels. They usually take to the islands about the first of June, the breeding cows and bulls being earlier than the rest of the herd.

And on the other side, page 176 the third paragraph from the top :

Very little has been published about the migrations of the seals on the North Pacific coast before they enter the Bering Sea, and this point is one from which we got a lot of interesting matter. We have taken a good deal of evidence about the presence of seals at Cape Flattery, and have been told that they were more numerous last spring than they have ever been before..... I find a peculiar idea existing among those who claim to be authorities in regard to seals found in the waters of South America, especially about Tierra del Fuego and the Straits of Magellan. The notion that they are the same species of seal as those found in Behring Sea and the North Pacific is quite erroneous.

That is a different matter.

Mr Justice Harlan. — That is the language of Dr Dawson.

Sir Charles Russell. — Yes.

General Foster. — All of these are quotations.

Sir Charles Russell. — No.

Mr Justice Harlan. — That which you read before is not a quotation.

General Foster. — It is from the London Weekly Times.

Mr Justice Harlan. — No, the end of the quotation from the newspaper stops before that.

Sir Charles Russell. — Now I come to a paragraph I wish to read. I need hardly perhaps have troubled the Tribunal with the other :

These facts about the habits of the fur-seals of Cape Flattery, which I have known for more than thirty years, have this year been proved to be correct by the Royal scientists, and will seem to show there are always two sides to every question. While I join with all the sealers with whom I have conversed that there should be a close season on the Pribilof Islands, when no seals should be killed on those islands or in Behring Sea, I equally join with some of the more intelligent and observing of these sealers, that the hunting of seals along the coast of Washington, British Columbia and South-eastern Alaska does not in any way affect the seal catch on the Pribilof Islands, as there is every reason to assume that these coast seals never enter Behring Sea.

Thereupon he proceeds to give his views upon pelagic sealing, which is not the point I am now upon.

Then in the last paragraph but one, on page 177 he refers to what is certainly a remarkable fact if it is correct — I believe it is correct — that after the seals are skinned their dead bodies are left on the island, and are not turned to account for the purpose of extraction of oil.

Mr Tupper is anxious that Mr Swan's position should be vindicated, and he refers me to a communication which is in volume III of the Appendix to the British Case; p. 191, I do not think I need trouble the Tribunal to refer to it. He is described as Assistant Collector, Port Townsend, Washington Territory. I am surprised that my friends should attempt to disclaim him.

It is a communication that is published in the records of the 50th Congress miscellaneous documents no 78 presented by Mr Dolph on the 15th March 1887, and ordered to lay on the table and be printed by the United States; and this shows that he was previously employed to report, because in page 192 he says.

In 1883 I was instructed by Professor Baird to investigate the habits of the fur-seals and to make a report thereon, which report may be found in the Bulletin of the United States Fish Commission, volume III, 1883 page 201.

So that he had some official position, and why my learned friends should think it right to disclaim him I do not know.

Now upon this question of property, I need not point out that if there be this intermingling, that if there be this interbreeding to however limited a degree, it makes the question of property in the individual seals a hopeless one, because the United States say, « These seals are the result of breeding upon the Pribilof Islands »; equally Russia might say, « They are the result of breeding upon the Commander Islands »; and when you get to a community and commingling and confusion of the two herds, and an intermingling or interbreeding of these two herds or families, whatever they are called, — to say there can be fixed, in point of law, a property in any one of that mixed and confused family is a proposition that is quite untenable.

Now, still in that same connection, a very curious fact comes out in the evidence of the British Commissioners, and I speak subject to contradiction and correction if I am wrong. I do not think it is in any way met or contradicted by the United States Commissioners. It is this — that the skins of the seals that come to land become almost immediately, or soon after they come to the land, in the condition known as “ stagey ”; that is to say, a condition in which their pelage is not in the best condition for the purpose of commerce, but that among the seals that are killed at sea by the pelagic sealers the number of stagey skins is exceedingly limited. This fact would seem to suggest that a change takes place periodically, probably annually, in the skins of each of these animals; yet when they remain almost continually in the water the change is more gradual and scarcely noticeable, whereas when they come to land and remain on the land, and are exposed to the effect of the atmosphere and sun for a considerable time, the stagey condition becomes more marked.

I will not stop to read them, but I would respectfully ask the Tribunal to note that in paragraphs 134, 281, 631 and 632 of the British Commissioners' Report the facts that I have adverted to are mentioned; and in Mr Macoun's Report, to be found in the first volume of the British Counter Case, Appendix, at pages 145 and 139, the same result seems to have been noticed by him.

Now one other point. I have stated that as regards certain of the seals they do not return to the islands at all, until they come there for certain definite purposes in connection with the perpetuation of their species : in

other words, that there is no need for the young male seals to come there till they are a certain age; that some do come but a great many do not; that in the case of the female seal there is no need for her to come there until she comes under the influence of the sexual instinct. Now I want to show that that is a fact.

Senator Morgan. — Before you approach that point, Sir Charles, I should like to make a suggestion. Counsel on both sides in this case seem to me to have neglected a very considerable and definite part of the evidence upon the subject of a necessity that nature has imposed on all seals, to land during some portion of the season for the purpose of undergoing this very process of shedding their hair. The evidence to my mind is convincing that that is just as much a necessity of the nature of the seal as the other instincts to which you refer; and that therefore it is that every seal is bound by a compulsion of nature to visit the shores during this stagey season, as they call it, when the coat is being shed. That impression having been made on my mind, I call attention to it merely for the purpose of inviting discussion.

Sir Charles Russell. — With great deference, I am not surprised that my learned friends on the other side have not dwelt upon that. I think that view is not well founded. It does not appear to be so, and the evidence to which I have directed attention points in a different direction — that, though this stagey operation may be gone through in the case of each seal every year, yet it is not necessary for the seal to come to land. The probability is that the operation is more gradual in the case of those when they do not land than when they do — in other words, the evidence rather points to the fact that they have been on land than to the fact that they are going on land.

Senator Morgan. — In order to get through it — at all events it has made that impression on my mind, and especially that Report of Mr Elliott to which you refer.

Sir Charles Russell. — We will look at it again in view of the intimation that you have been good enough, Sir, to make.

In reference to this difficulty, which points to the impossibility, or impracticability, or both, of identification, all they say about it is on page 49 of their written Argument :

The difficulty of identification may be suggested, but it does not exist. There is no commingling with the Russian herd. Every fur-seal on the North-West coast belongs indisputably to the Alaskan herd.

That is statement, but it is not proof. On page 232 they say :

The marked differences between the Alaskan and the Russian seals are such as to be readily and plainly discernible to persons familiar with the two herds and their characteristics. This, once established, would naturally prove that there is no commingling of the respective herds.

We have shown by the evidence which I have read (which I can see no reason to doubt, though it is for the Tribunal to judge) that there is commingling.

I am now going to another point; namely the absence of these seals for a long period of their lives from the Islands. I refer to the evidence of Mr Bryant in volume I of the Appendix to the British Counter Case, page 125. Mr Bryant is a gentleman who has been employed by the United States before to report on this question; and, on page 125, we have put side by side a comparison of the statements made by this gentleman in his monograph of 1880, written at the instance of the United States Government, and the reports and evidence which he gave from 1869 to 1876.

Mr Justice Harlan. — Which side of that page do you refer to?

Sir Charles Russell. — For this purpose, to both. He differs, you will see, as to the duration of the absence; but in each case he admits that it is for a long time.

In 1876 he said : —

About the 20th of July the great body of the previous year's pups arrive and occupy the slopes with the younger class of males, and they continue to be mixed together during the remainder of the season. The 2-yearold females, which pair with the young males in the water near the island, also now associate with the other females.

At this stage they (the female pups) leave the island for the winter, and very few appear to return to the island until they are 3 years old, at which age they seek the males for sexual intercourse.

On the other hand, the males return the following year with the mature females

Mr Justice Harlan. — Does that mean the young males?

Sir Charles Russell. — I think it does.

But the young females, as already stated, are not seen in numbers until they are 3 years old, when they arrive in the height of the breeding season.

Then :

The masters and officers of these schooners (of the Alaska Commercial Company) who are familiar with the seals, say they see small groups of small (apparently 1 and 2 year old) seals at all times during July and August.

That means in the sea.

These, I think, may be young females, which, as already stated, do not visit the island till they are 3 years old.

Then the other statement that he made in his later Report was :

Returning again, this time as 2-year-old, _____

This is the deposition which he makes in this case; therefore, he makes a curious contradiction there of one year, _____

the males go upon the hauling-grounds with the bachelor seals, and the females land on the breeding rookeries. It is probable that the females of this age are fertilized by the bulls, and leave the islands in the fall pregnant.

On returning the third year the young male goes again upon the hauling-grounds, and the female to the rookeries, where she brings forth one pup.

Now, there is certainly a very remarkable difference in the two statements; the first statement is the earlier; the one on the left-hand side is that the female, after leaving as a pup a few months old, does not

come there except acting under the impulse of the sexual instinct, and then she returns at three years of age; and, again returns the next year, as a 4-year old, to deliver her pup.

Mr Justice Harlan. — The phrase “ 2-year olds ” refers to males.

Sir Richard Webster. — I think to both.

Sir Charles Russell. — Yes, it goes on to say :

It is probable that the females of this age, and so on.

Mr Justice Harlan. — The first sentence refers to males.

Sir Charles Russell. — Yes; but to females in the next instance. He says :

Returning again, this time as 2-year-olds, the males go upon the hauling-ground :

That is, of course, 2-year olds :

And the females, that is the females of the same age, land on the breeding rookeries. It is probable that the females of this age are fertilised by the bulls.

And so on.

Now finally in this connection, and still bearing on the question of property and the possibility of identification, you will recollect that my learned friends have again and again said that not merely do they return to the island on which they were born and attach themselves to the land of their birth, but that they return to the same spot. We have luckily the means of testing this by experiments which their own witnesses depose to. This same Mr Bryant went through the experiment of marking a certain number; the account of the experiments will be found in the large volume of the British Appendix page 451. He states that he was an agent employed by the United States and had previously reported.

I find he states in this deposition, made for the purpose of the Case of the United States, that his experience in the Pribilof Islands extended from 1869 to 1877, so that he had considerable experience.

If you want to know more about his experience, I shall be able to give it to you but I do not think it is important enough. I was referring to page 451 of this last volume. I think it is the same experiment that was referred to by Mr Elliott, and the paragraph to which I refer is about the middle of the page. He makes a citation from Mr Elliott in which he says :

Mr Elliott in fact himself writes on the same page (referring to the presence of a large sealing fleet in Behring Sea), that it could not fail in a few short years in so harassing and irritating the breeding seals as to cause their withdrawal from the Alaska rookeries and probable retreat to those of Russia, a source of undoubted Muscovite delight and emolument, and of corresponding loss and shame to us.

Mr Justice Harlan. — That is not Mr Bryant's statement.

Sir Charles Russell. — No I think I said he began by citing Mr Elliott.

Mr Justice Harlan. — I mean to say that that document is not prepared by Mr Bryant. It is prepared by Dr Dawson as a memorandum

on Mr Blaine's letter to Sir Julian Pauncefote as you will see at page 436. All I meant to say was that that was not the statement of Mr Bryant.

Sir Charles Russell. — Quite so. I think you are right so far.

I thought it was and I think it will be found that it is in another form. If I have been mistaken in that I shall be very sorry.

I will read the print, however, as it stands.

His remark implies that the seals may resort to either the Pribilof or the Russian Islands, according to circumstances; and who is to judge, in the case of a particular animal, in which of these places it has been born? The old theory, that the seals returned each year to the same spot, has been amply disproved. Elliott himself admits this, and it is confirmed by Captain Charles Bryant, who resided eight years in the Pribilof Islands as Government Agent, and who, having marked 100 seals in 1870 on St Paul Island, recognized the next year four of them in different rookeries on that island, and two on St George Island.

Those two islands being some 30 miles apart. But I should like, as Mr Justice Harlan has referred to it, to see exactly what Mr Bryant says.

Mr Justice Harlan. — You will probably find it in Mr Allen's book.

Sir Charles Russell. — Perhaps that is what it is. I know I have satisfied myself that it was adopted by Mr Bryant; but I think your observation is quite correct. I find that my reason for so stating it is that on page 129 of our Counter Case, after giving the Elliott experiments which I am now going to refer to, the observation is then made, the same or a very similar experiment is referred to by Captain Bryant, and I can prove that.

Lord Hannen. — The passage seems to be referred to.

Sir Charles Russell. — Yes, and I find also in the Congressional Report on the Fur-seal Fisheries of Alaska, Dr H. H. McIntyre, who was referred to by my friend as a great authority, says the seals are found indiscriminately on the two islands; that is, seals born on St. George are found on St. Paul, and *vice versa*.

Now I wish to read this experiment of Mr Elliot. His is the Census Report for 1880, which has been frequently referred to, published in 1881. The document is printed at the Government Printing office at Washington, Department of the Interior, 10th census of the United States, Walker, superintendent, and so on. The paragraph to which I am referring is on page 31.

The first arrivals are not always the oldest bulls.

I will read this shortly.

Their method of landing is to come collectively to those breeding grounds, where they passed the prior season; but I am not able to say authoritatively, nor do I believe it, strongly as it has been urged by many careful men... that these animals come back to and take up the same position on their breeding grounds that they individually occupied when there last year. From my knowledge of their action and habit I should say very few, if any of them make such a selection and keep these places year after year. —

and so on. And he comes to the conclusion that they do not come to the same spot.

He proceeds :

It is entertaining to note in this connection, that the Russians themselves, with the object of testing this mooted query, during the later years of their possession of the Islands, drove up a number of young males from Lukannon, cut off their ears, and turned them out to sea again. The following season, when the drives came in from the hauling grounds to the slaughtering fields, quite a number of those cropped seals were in the drives, but instead of being found all at one place, the place from whence they were driven the year before, there were scattered examples of croppies from every point on the island. The same experiment was again made by our people in 1870 (the natives having told them of this prior undertaking) and they went also to Lukannon, drove up 100 young males, cut off their left ears, and set them free in turn. Of this number during the summer of 1872 when I was there, the natives found in their driving of 75 000 seals from the different hauling grounds of St Paul up to the village killing grounds, two on Novatoshnah rookery, 10 miles north of Lukannon, and two or three from English bay and Tolstoi rookeries, 6 miles west by water; one or two were taken on St George Island, 36 miles to the south-east, and not one from Lukannon was found among those that were driven from there; probably, had all the young males on the two islands this season been examined, the rest of the croppies that had returned from the perils of the deep, whence they sojourned during the winter, would have been distributed quite equally about the Pribilof hauling grounds. Although the natives say that they think the cutting off of the animal's ear gives the water such access to its head as to cause its death, yet I noticed that those examples which we had recognized by this auricular mutilation were normally fat and well developed. Their theory does not appeal to my belief, and it certainly requires confirmation.

Therefore, that experiment shews that this suggestion of attachment to a particular spot or even to a particular rookery, is not well-founded; that it does not exist even with regard to a particular Island, but that of those that were so marked on one Islandsome were found on another Island 36 miles away, and some were not found at all. What became of the rest? Who can tell? Their natural enemies, no doubt, could account for some of them; some may have intermingled with the Russian herd, and others gone elsewhere. Who can tell? No one. And all this difficulty and uncertainty of identification, the Tribunal cannot fail to see, has a most important bearing on the question of the claim to legal property in the individual seals. Let me illustrate what I mean; supposing, instead of both these Islands being in the possession of the United States, that the dividing line of territory, had been drawn between these Islands, and one was left in the possession of Russia and the other of the United States: would such a claim to property be possible then? Or, again, to take another case which throws a stronger light on this question of property. Supposing that instead of the United States being not merely the sovereign owners of the land, but also the owners of the *dominium utile*, — suppose, as is the case with the Scilly Islands on the south-west coast of England, and as is the case with many Islands in the Gulf of St Lawrence, and as is probably the case with many Islands off the coast of America, that the *dominium utile* was not in the Government but only the “ eminent

domain", — that the *dominium utile* was in the man who lived on the Island, — let us see what would be the result of this. The argument for the United States must go the length of saying that the owner of those Islands could assert, against all the world, property in the individual seals frequenting those Islands and might assert the right to maintain that claim of property wherever those seals were to be found.

Again let me put a case which further illustrates what I conceive to be the untenable character of the position. Assume that the Islands are separately owned by two different owners; or separately leased, one to one lessee and one to another lessee; would it be possible to assert, even *inter se*, the right of property in individual seals found in Behring Sea, or anywhere out of Behring Sea, as belonging to one or other of the lessees of those Islands? If it be difficult, *inter se*, to regulate the rights and claims of property, it is still more difficult as regards third persons.

Now, all these considerations, each of them strong in itself, collectively, I submit, are very difficult to meet, and do something more than suggest the impossibility, as I submit, of affirming property in the seals on this initial difficulty of identification.

But those are not the only difficulties. Is there any one of the Tribunal who has any doubt that, taking the facts which are not in dispute as regards this animal, this amphibious animal, I have described an animal which the law has classed, has designated, an animal *feræ naturæ*. Is there any one who doubts it? There are undoubtedly three classes in this connection: The class of wild animals, the class of domestic animals, the class of animals which, while belonging to the class of wild animals, have been taken out of that class by reclamation, so that they have ceased to be wild: have become reclaimed, domesticated, and therefore are removed in law out of the category of wild animals. Now is it to be gravely said that seals are in the category of tame animals? What is the index to their being tame? How have the United States even professed to tame them? Have they alleged, can they truly allege, anything more than that which I have conceded to them from the beginning, that by reason of the incapacity and mildness of this animal to defend himself on land, he presents an easier task to the man who goes to knock him on the head with a club; and thereby gives to the United States or their lessees greater facilities for killing them? but except knocking them on the head, and preventing anybody else knocking them on the head, what do these gentlemen, or the representatives of this Government, do to take even the simplest step towards acquiring property in the animal on the ground of reclamation, or *per industriam*.

The alleged tameness
of the seal con-
sidered.

One further remark before I come, as I suppose I must come, to the propositions, the vague and general propositions, my friends have advanced. It has been a matter of surprise to me that my learned friends have not addressed themselves to the consideration of the very first step which is to be taken before there can be an assertion of property in any

wild animal : that step is possession. You must first take the animal. They have on the islands tens of thousands, according to Mr Elliott, millions, of seals. They drive large numbers of them under circumstances of great cruelty, if Mr Elliott's account be true, for the purpose of selecting, knocking on the head, taking possession of, a certain number. In that certain number their property becomes absolute. They have killed them and taken possession of them just in the same way as the man who shoots a rabbit and puts it in his pocket or in his hunting bag has taken possession of that rabbit; the property is his, unless, according to English and according to American law, he has shot it upon land in the character of a trespasser, in which case he does not get the property even then — wherein the English municipal law and the American municipal law, as one of your body will tell you, differs from the civil law. According to the Roman law — which is a little stronger illustration of the wild animal being no one's property until possession is taken of it — according to the civil law, if I shoot a rabbit upon another man's land, although I am committing a trespass on the land in the act of shooting, yet the property in that rabbit will be in me whereas according to English law the property would not be in the trespasser, but would be in the owner of the land. The French law is the same, as I shall hereafter have the opportunity of showing to the Tribunal.

I wish now to come — because I am not relieved from any part of this task — to a little closer examination of the position. If I am right in saying that this animal originally is properly described as an animal *feræ naturæ*, it lies upon my learned friends to bring him out of that category, to show that he belongs to a different category as a reclaimed animal. I have ventured to suggest there is not a scintilla of evidence to justify the claim of reclamation. The *onus* is upon my learned friends by some authority, upon some principle of law, to show that in such circumstances they have a claim to property in that animal on the high sea, or wherever it is outside their domain. I have pointed out they have not the property even when it is on the Island. They have the right to kill it. They have the right to prevent anybody else killing it; but that is not property. It is a mere right to kill; nothing more.

My learned friend is met with this difficulty: He asks himself the question. By what law, in view of what law, am I to consider this question? and knowing, as he does, that the municipal law of Great Britain is the same as the municipal law of the United States, my learned friend says that this is not a matter to be determined by municipal law, but a matter to be determined by international law. I dispute that proposition. What has international law to do with it?

Am I not well founded in saying that by the municipal law of every country in the world, the right to property in things must be made out according to the municipal law of the place where the property is situated, subject always to certain rules as to devolution, etc., with which we are not now concerned, founded upon the principle that *mobilia sequuntur*

personam. They must have their right of title by municipal law. Does the United States municipal law give them property? No. The legislation even of the United States has not affected to give property. The United States legislation has proceeded upon the principle which I have so often adverted to, of the assertion of territorial dominion over a given area, and the application of what I may call game laws to that area; but it has not in its Statutes nor by any executive act, nor by lease, nor in any other mode, affected to claim for itself the property as such, nor to give to the lessees the property as such. They give to the lessees no more than they had themselves: a right, namely, a license to kill within certain limits as to number.

Senator Morgan. — I was about to inquire whether all game laws were not predicated upon the ultimate ownership of the property in the sovereign?

Sir Charles Russell. — No, Sir; they are not. There are certain classes of animals, which unquestionably in ancient days — the subject is almost without interest in these times — the taking or killing of which were within the exclusive grant and right and franchise of the Sovereign — the sturgeon was a royal fish, the swan was a royal bird. These were the only exceptions that I can for the moment call to mind. There were certain other franchises which were supposed to be only within the power of the Sovereign to create, as for instance, a free warren, or a deer park; but these are, again, instances which have passed from the domain of practical importance.

But the game laws of different countries have nothing to do with the question of property in the wild animals. Their sole operation is that the hand of the slayer shall be stayed for a certain period of the year; that within the defined period called the “close time”, he shall not be at liberty to exercise that right of killing which the law itself recognizes; but it does not touch, it does not affect in any way the question of property. The question of property, according to the law of every civilized country that I know of, depends upon the considerations of possession and dominion, upon the nature and habits of the animal, and upon the physical relations of man towards that animal.

Senator Morgan. — I do not question that position as between individuals, but between the Crown and individuals I think it is otherwise.

Sir Charles Russell. — Well, Sir, I am not aware of any authority which gives to the Sovereign any more exclusive right to kill wild birds than anybody else, or to interfere with anybody else killing them. Indeed I may remind Senator Morgan that the term that is used to describe wild animals with reference to the rights of others is borrowed from the civil law. They are described as *res nullius*, and therefore a thing which any one may capture, a thing which the man who first possesses and captures may acquire the property in. The authorities which I shall presently refer to I think will make that clear.

There is one other preliminary word I should like to say; and it may have some bearing upon what Senator Morgan has been good enough to ask. I think that perhaps what the learned Senator may have in his mind is a historical recollection of a state of things which has long passed away, which relates back to the time when the feudal system existed and when—and the learned President will recognize the illustration I am giving in reference to the state of things in France before the Revolution — when no one below a certain degree or status had a right to indulge in these sports, which were reserved to what was then supposed to be the better part of mankind; and when these privileges of hunting, shooting, etc., had to be acquired by authority from the sovereign — a state of things which has long passed away, both in this and most countries, and in England: but it has nothing whatever to do with, does not touch in the faintest degree, the question of property.

I must notice, before I proceed, a suggestion, I did not really conceive it to be much more than a suggestion, that this question of property was to be judged differently from the mode in which it would be judged if it were a claim by a private owner of the Pribilof Islands to the property in himself; in other words that the question of property assumes a different character — I do not know that I am well founded in saying that this distinction was made — but that the question of property assumes a different character, is a different thing, is to be tested by different principles, when the claim to the property is put forward in the name of the United States. If that is so — I do not know really whether it is meant to be so or not — I say there is no such distinction to be made. For what would be the result? You would be called upon to say that if the Pribilof Islands were owned by a private owner, and that he was the person who was here formulating the complaint of interference with his rights of private property, his cause being taken up by his Government and presented to this Tribunal, you would be obliged to affirm — if I am right in my argument so far — that he had no property; but that if the United States is the owner of the Islands, and merely leases them to the lessees, a different set of considerations apply, and that that collective idea, that legal entity, the Government of the United States, may have property although the private individual could not. I say there is no warrant in law for the attempt to draw the distinction. Governments may own property just as individuals do; but their right to that property depends upon the same principles and the same considerations of possession and dominion which are vital to the question of property in an individual. If there be any doubt in the minds of the Tribunal upon that point, I will endeavour to elaborate it a little later in my argument.

That being the position of things, and my learned friend having cited authorities in his written Argument which disprove his case, as I hope to satisfy the Tribunal, and having been obliged to admit that he cannot found any title based upon the municipal law of his own country, or the municipal law of England, or the municipal law of any civilized country

in the world, what does my learned friend do? He has — I say it with all deference to him, because he has made the best of a difficult position — he has in the absence of definite authority been obliged to indulge in treacherous generalities; he has been obliged to accept the theories of metaphysical writers as to what they think the law ought to be instead of what the law is. He has floated about amongst the clouds, and he has made very eloquent appeals, very eloquent appeals indeed, to the eternal and immutable principles of justice and humanity. I am reminded of an aphorism, attributed to the late Lord Brougham, who is reported to have said on one occasion when he heard an advocate make an eloquent appeal to the immutable principles of nature and of justice, that he felt quite certain that advocate had very little law on his side.

A similar expression of opinion, I think not without its significance, was also attributed to another distinguished judge, Lord Ellenbrough. On one occasion, an advocate almost as eloquent as my learned friends, Mr Carter and Mr Coudert, was making these appeals, and amongst other authorities he referred to the great Book of Nature.

“What are your authorities?” said Lord Ellenbrough. “My Lord, the Book of Nature”. “What page, and what edition?” said the learned Judge.

The orator was obliged to descend a little rapidly to the dull level of prose.

Now, what are these propositions of my learned friend; because I suppose I must examine them. We have had a disquisition upon the institution of property, and as to its foundations. We have been told, and I was rather startled at the suggestion, that property existed anterior to human society, and that one of the great objects of the invention of society was the preservation of property. That will be found at page 366 of the report. Therein my learned friend, I think, put the cart before the horse. “Subjects of property existed anterior to society, but there was no property in the legal sense of that term, until society.” Then my learned friend said, on page 393, that individual ownership was an invention of society, from which it would appear to follow that community of property had existed previous to society; and finally he said that “property sprang from the necessity of peace and of order.”

I quite agree; but when Adam walked out of the Garden of Eden, there was no need of a policeman to keep order, and property grew because the needs of society required that property should grow. Property grew because of that desire, inherent in the human breast, for peace, for order, for convenience, for the avoidance of disturbance; and as society grew, even in its earliest and rudest stage, a certain moral opinion grew with it, which gradually, at first in very small matters, afterwards in much wider matters, grew to a recognition of a special or exclusive right of user of particular things. But when my learned friend in this connection goes on further to appeal to the law of nature, I merely have to ask the Tribunal, what has the law of nature to do with it? The law of nature, I suppose, means the natural law, or the law in a

natural state of society. Well, the law, so far as there could be said to be law in a natural state of society, was that a man got what he conceived to be necessary for his wants, and stuck to it, as far as he was able to stick to it. I say it would be much truer to say since my learned friend is relying upon the law of nature to support his argument — it would be much truer to say that law in its development, has not been based on the law of nature, but is in restraint of the law of nature, which had for its sanction force, and force only.

But these propositions, while interesting to discuss, seem to me very wide of the questions which we are here engaged upon; and I shall be very glad, if, as the interval of adjournment has been a little longer than usual, I might be allowed to go on a little further with this question of property.

The President. — Certainly.

Sir Charles Russell. — My learned friend, in his argument, stated two propositions, one of which I admit to be substantially right, the other of which I submit is radically wrong; and yet my learned friend has put them together, and has said that they were in effect the same proposition. I think it would not be a waste of time if the Tribunal would allow me to read these two propositions without comment. In the first instance, on page 379 of the print of my learned friend's argument, he says :

Mr Carter's two propositions as to property in wild animals examined.

Now from all those authorities, drawn from the municipal law of many different nations, confirmed by the ancient Roman law, these propositions are exceedingly clear, that —

This is his first proposition :

In reference to wild animals, if by the art and industry of man, they may be made to return to a particular place to such an extent that the possessor of that place has a power and control over them which enables him to deal with them as if they were domestic animals, they are in law likened to domestic animals, and are made property just as much as if they were domestic animals.

That proposition is, I admit, substantially correct. Then he goes on, a little farther down :

And you may state another proposition fully substantiated by these authorities. It is scarcely another proposition; it is almost the same thing, but the language is in a different form.

Here is the next proposition which is said to be the same as the first. I agree substantially with the first, but respectfully differ with the second :

That whenever man is capable of establishing a husbandry in respect of an animal commonly designated as wild, such a husbandry as is established in reference to domestic animals, so that it can take the increase of the animals, and devote it to the public benefit by furnishing it to the markets of the world, in such cases the animal, although commonly designated as wild, is the subject of property, and remains the property of that person as long as the animal is in the habit of voluntarily subjecting himself to the custody and control of that person.

You observe the propositions are essentially different. In the first, he correctly states the foundation upon which the claim of reclamation, or, in other words, the claim *per industriam*, is based : namely, that by the art and industry of man, the wild animals are made to return to a particular place, so that they can be dealt with, etc.

But in the next proposition it is said that “ whenever a man is capable of establishing a husbandry in respect of an animal commonly designated as wild, so that he can take the increase”, etc., that equally gives him the property.

Now, let me test these two propositions. If the latter proposition is true, it is true also that the owner who rears pheasants on his estate is the absolute owner of them. So as to rabbits; so as to wild deer, unenclosed; so as to grouse. Now let me call attention to the fact how much stronger the case as to pheasants, grouse, rabbits, deer, is. In the case of the pheasants I have already stated what is done in the way of rearing them. I have already stated what is done in the way of feeding them. I have already stated what is done in the way of preserving them from attacks from outside by means of game-keepers and others. If this proposition is true, then the owner of the pheasantry who kills his game, as he may do, for the purpose of supplying the market, and so establishing an industry or a husbandry, and who can discriminate the sexes, because he can shoot only his cock pheasants, — he too has a property, forsooth, in the industry, and in the cock pheasants and in the hen pheasants, and he may deny the right which the law, as I have said, of every municipal country now gives to everybody, the right of killing these animals when they are outside the land of the particular owner of that pheasantry.

So in the case of rabbits. A man may establish an industry in a rabbit warren. So in the case of grouse. A man may only kill his cock birds. So in the case of wild deer, in an unenclosed park; he may only kill his bucks. This argument would land my learned friend, therefore, in the proposition that as regards all these animals, which are admittedly of the class of animals *feræ naturæ*, which are admittedly not domesticated, but which are “ cherished ” in a higher sense than the seals are cherished, for they are fed and induced to come back to this place — all these animals would become the subjects of private property.

We have had a frequent reference to the general principles embodied in the phrase “ *Sic utere tuo ut alienum non lædas.* ” That maxim carries you no further. You have to define what is yours and what is mine. You have to define what is injury or what is not injury. You are all in the vague; you are all in the general. These general maxims tell you nothing. By merely saying “ *Sic utere tuo ut alienum non lædas,* ” you do not carry your proposition one whit farther, nor help the Judge who is to decide the question.

Then we come to another proposition, to which great significance was attached — a proposition which, so far as I could see, had been invented by my learned friend as a kind of formula for the purpose of meeting the

case of the fur-seals. It was this : That only the usufruct of property is recognized by law, and that there is no right exercisable in respect of wild animals, generally speaking, (because he said there were some which were quite inexhaustible, and therefore people might in that case do what they pleased), unless in the exercise of your right you take only the superfluous males, and in that way do not interfere with the stock.

Mr Carter. — I made no such argument.

Sir Charles Russell. — Oh, really, Mr Carter, did you not maintain that? If not, I of course withdraw it.

Lord Hannen. — What page and what edition?

Sir Charles Russell. — I am afraid I shall have to give you a good many pages. But I will come to it to-morrow morning and justify myself by reference to the actual pages. I certainly wish to make this quite clear before I go away to-night. Did not my learned friend say that he was affirming only a right of usufruct of property, and that there was no such thing as absolute property?

Mr Carter. — I said by the law of nature that was all that was given to man.

Sir Charles Russell. — But the law of nature is the same thing as international law, according to my friends, and it is international law that he is here invoking.

Mr Carter. — If you are determined not to understand my argument I cannot help it.

Sir Charles Russell. — I assure you I am not in that position at all. I really am not ; but to avoid any discussion, I will pass that.

Mr Carter. — I will not interrupt you again.

Sir Charles Russell. — Not at all ; it is not the least interruption in the world. I will pass that as a disputed proposition, and I will come to it to-morrow morning and read the pages.

One topic I can deal with, I think, without any risk of being interrupted. My learned friends have expended a great deal of their eloquence in the printed argument, and in the oral argument, upon the wasteful character of pelagic sealing. They have denounced it as a crime, a moral wrong, an indefensible wrong, and have used various other strong epithets. And now I want to ask, and I expect that an attempt will be made to answer it at some later stage. What is the relevance of that argument to the case of the United States? Is it because the mode pursued by the Canadian sealers in killing seals is wasteful that they have no right : but that the United States have a right, an exclusive right, because their method is not wasteful? I want to know. Does their right depend upon, or is it stronger or weaker according to whether our mode of killing is wasteful or not wasteful? In other words, if we could discriminate while shooting at sea, between the males and females, if we could only shoot barren females, if we could only shoot young males, do they admit we have the right to shoot them? Do they, if we have the means of shooting them in

Wastefulness of pelagic killing irrelevant to decision of the question of property.

a manner, to use their formula, which is not wasteful, do they admit we have the right to shoot them?

The President. — That argument would perhaps affect rather the question of regulations.

Sir Charles Russell. — You are anticipating exactly the point to which I am coming. But it is used in relation to property.

The President. — The other side have argued both questions at the same time, in one argument.

Sir Charles Russell. — I quite agree, sir; but they have mixed them up. They have not only argued them at the same time, but intermingled them. This was put distinctly forward as a consideration in support of the argument on property. I want to know, is it to be relied upon or not. It must be obvious — as you, Sir, with your acuteness, have already perceived — that it can have no bearing upon the question of property. If we have a right to do a thing, the fact that we do it in a wasteful way cannot change a right into a wrong. The fact that we do it in a wasteful way cannot give them a right which they otherwise would not have.

I dwell upon this, however, for this reason, that I want to show you, to satisfy you, that while this question of wastefulness of pelagic sealing is most appropriate to be considered in relation to the question of regulations, it must be discarded from the consideration of the question of property, and ought not to have been introduced into the consideration of the question of property, where it has no legitimate place, where it could only be used for the illegitimate purpose, not of aiding the judgment of the Tribunal, but of prejudicing it and distracting it.

Mr Justice Harlan. — Does it not bear on the question of the right to protect the industry at the island?

Sir Charles Russell. — I am coming to the question of industry presently. I was dealing with the question of property either in the industry or in the seals. I would ask that question again, as Judge Harlan has been good enough to put it. Is it alleged that the right of protection of their industry depends upon whether we kill wastefully or not? I should like an answer to that. Is it to be alleged that the right to protection of the industry is strengthened or depends in the slightest degree upon the question whether we kill wastefully or not?

Mr Justice Harlan. — If the killing at sea is calculated to destroy the industry, it would seem to have some bearing on the question of protection, if that right to protect exists.

Sir Charles Russell. — “ If ”. “ There is much virtue in an ‘if’ ”.

Mr Justice Harlan. — I am making a distinction between a mere question of property in the seals or in the herd, and the question of the right to protect the industry on the islands.

Sir Charles Russell. — You mean the proposition which my learned friend, Mr Phelps, advances in his argument, that even if there is no property in the seal, and no property in the herd, yet there may be a right to protect the industry. That I will come to in a moment.

Mr Justice Harlan. — Mr Carter covered that ground, the question of protection, before he got to regulations.

Sir Charles Russell. — Yes.

Mr Justice Harlan. — You are saying that on the question of property simply, the discussion as to the wasteful character of pelagic sealing was irrelevant. I simply inquired whether, independently of the question of regulations, and independently of the question of property, the wastefulness of pelagic sealing would not bear on the question of the protection of the industry at the islands.

Sir Charles Russell. — Oh, independent of any question of property?

Mr Justice Harlan. — In the seals.

Sir Charles Russell. — That pelagic sealing may injure the industry on the islands, if it be so called, nobody doubts. That is not the question we are discussing; but I say that in respect to any right of protection of an industry, or in respect to any right of protection of the seal or of the herd, the question of the wastefulness of the means has nothing whatever to do with it, and cannot give them a right which they have not got without it, or put us in the wrong if we are in the right.

The learned President has said, what is quite, I think, the accurate truth of the matter : it cannot be invoked to give a title to the United States or to their lessees which they have not otherwise got. It is material — most material — when you come to the question of regulations.

The President. — Sir Charles, I must observe that there is a protection of an industry which is often called property today : what we call in French “ *propriété industrielle* ”, that is, a sort of qualified property. It is a sort of right which in my personal opinion is wrongly called property, but it is so called, however, in the current use of the language of all nations to-day, and Treaties have been made between nations to protect that property. As it is a certain artificial construction of law it may be relevant to plead that it is more or less worthy of protection, according to the more or less degree of morality which resides in it.

Sir Charles Russell. — Could you give a concrete illustration, sir, of that law?

The President. — For instance, the right of authors, copyright. That is styled “ *propriété littéraire* ” in our Treaties. That is not property, in my personal view, but it is commonly called property in international language. That of course is a sort of qualified right, which may be more or less extended and which, in fact, has been more or less extended, I mean, to justify the introduction of the argument of the other side, as to the moral character of the right which is protected, or in respect of which protection is invoked. I do not argue the case now, of course.

Sir Charles Russell. — If there is a right there is a right.

Lord Hannen. — I understand that you are contending now, that the need of the protection to make the thing valuable, does not establish that there is a right to it that protection.

Sir Charles Russell. — No ; I tried to say so, and I think I succeeded in saying so more than once, and I applied this to the right to the industry just as to the fur-seal.

May I say, Sir, as you have introduced the question of copyright, there is no such thing as the recognition internationally of copy right or of patent right except by Treaty. There is no such thing, and there is no country in the world that knows that better than America, because it is only very late in the day indeed that it has come into any arrangement with Great Britain of a protective character of that kind. On the other hand I may point out according to the opinion of distinguished lawyers in England, so far as municipal property is concerned, the statutes which protect copyright are but an affirmance of a principle which is a principle of the common law.

The President. — I understand the argument of the other side to go some what to the same extent as regards the protection of an industry. They want the industry protected as others want copy-right.

Sir Charles Russell. — I will come to that presently.

The President. — I think Mr Justice Harlan was speaking of an industry.

Sir Charles Russell. — He was, but I was following the line of property in the fur-seal or herd of the fur-seal, and I will come, in due course, to the question of the industry itself, and what a right in an industry, in point of law, means. That is not the point I was at that moment upon.

The President. — Then perhaps we had better come to that to-morrow.

[Adjourned till to-morrow at 11. 30.]

TWENTY-SIXTH DAY. MAY 24TH, 1893.

Sir Charles Russell. — Mr President, yesterday when I was referring to the report of Mr Elliott upon a point which I conceived affected the consideration of the question of property in seals, I referred to him as a man who was vouched by the United States as a great authority on the seal question, and my learned friend Mr Carter very properly challenged me upon that and asked me where he was so vouched. I had not the reference at the moment at hand, but I promised that I would refer to it this morning. As early in the discussion as the 4th April, which seems now a long way back, at page 13 of the printed Report I referred to those authorities in a passage which runs thus :

Mr Elliott is a gentleman who in the diplomatic correspondence leading up to this Treaty has been vouched by successive Ministers of the United States as an authority without any equal. Mr Bayard, when he was Secretary of the United States, writing upon the 7th of February, 1888, describes Mr Elliott as “a well known authority on seal life”. That communication is to be found in the United States Appendix to their Case, and I can give my friends the reference, if they have not it at hand. Later, on the 1st of March, Mr Blaine, who was then Secretary of State in America, on that date quotes Mr Elliott again, in similar language, as an important authority on seal life : and finally on the 3rd of July 1890, Mr Goff, Treasury Agent to the United States, cites Mr Elliott in this language : He says “ There is but one authority on the subject of seal life ”, and he refers to Mr Elliott as that one authority.

That therefore is my justification for the reference which I yesterday made. I have only to say in addition that this gentleman was, by a special statute of Congress of the United States, appointed in the year 1890 for the purpose of making the very examination which resulted in the Report from which I yesterday made certain extracts. At this stage of the discussion, and in this connection, I say no more upon the subject.

There are one or two points to which I wish to refer in order to clear up, possibly, a lingering doubt which may remain in the mind of Senator Morgan, as to the question he put to me as to the paramount right of a State in relation to property. I referred yesterday, and I think with correctness, to the law of France and the law of England in ancient days, founded on the feudal principle, as to grants of hunting and so forth, being in the nature of royal franchises; up to a certain period in the history of both countries, these franchises were only conceded to persons of a certain status. But I have since been thinking that the learned Senator had in his mind the idea expressed by the words “ eminent domain ” : if any doubt remains that that has no connection with the question of pro-

perty which we are here considering, I would wish to clear it up. I can best illustrate that by giving a concrete illustration of the law of eminent domain. Assume that the owner of a given estate dies without heirs : by right of eminent domain that estate would go to the Crown, according to the English law, but it would go to the Crown with just the same rights and no more than the original owner of the estate possessed; and applying it to the concrete subject which we are here discussing namely, the question of rights as to wild animals that might be upon the estate, the rights would be precisely the same as those possessed by the previous owner —. The right *ratione soli* to kill the wild animals when on his land, the cesser of that right when off his land, and the right of any persons who might then capture them to take them according to the general law. Therefore, this right of the Crown does not in any sense touch the question which we are engaged in discussing.

Senator Morgan. — It was not the right of eminent domain that I had in my mind, but it was the power of the sovereign Government of every nation to control any property within its territorial limits if it is *res nullius*.

Sir Charles Russell. — That is undoubtedly the power of the State within its own territory — it can pass any laws it pleases. That is undoubted. That is a proposition of constitutional law which cannot be argued. — It has, undoubtedly, a perfect right to make any laws it pleases within the limits of its territorial jurisdiction, in relation to the property within that jurisdiction.

Senator Morgan. — And can therefore assume ownership or proprietorship over property that is *res nullius*.

Sir Charles Russell. — Certainly, if it so chooses, and I think I am right in saying that by the law of, at least, one country, the law of Russia, there is no such thing as *res nullius* : for that which is not appropriated to private ownership is by the law of Russia regarded as in the ownership of the Crown.

Senator Morgan. — I thought it was the law of Great Britain as well, but I am mistaken in that.

Sir Charles Russell. — Yes, I think so, Sir. I think I have stated it correctly. I do not wish to recur to my argument which related to the conditions necessary to constitute property in wild animals, but I wish to emphasize a point which I am afraid I did not emphasize sufficiently — that there is no such thing as absolute property in wild animals. Without recurring to the conditions which affect the acquirement of property in wild animals I wish to emphasize this point, that even in the case of animals that are reclaimed, there is no absolute property : the property that is created by reclamation ceases if the animal resumes its wild habits and escapes at large, the *animus revertendi* disappears. So that even in the case of reclaimed animals there is no such thing as absolute or perfect property.

When I was upon the point that the manner in which seals were killed

by pelagic sealers could not be the foundation of, or even a buttress for the right of those on the Islands, I failed to notice one point. If that is admitted, then, of course, as I said yesterday, all this discussion, so far as it relates to property — but not to Regulations, for I agree it then becomes relevant — may be disregarded as a mere matter of prejudice; but I failed to point out what must follow from that.

If it is admitted to be irrelevant, as I contend it must be admitted on the question of property, then it must necessarily follow that the United States will be driven to say that they are asserting upon the sea a right superior to ours, even if we kill by pelagic sealing only barren females or old, or superfluous males; even if we can kill non-wastefully, economically and discriminately. That follows inevitably.

Now, I also desire to give in this connection an illustration of the position as to property and as to the right to pelagic sealing by, not an ideal case, but by the case as we know it exists. I will put it, in the first instance, as if it were an ideal case. Assume pelagic sealing to be pursued for a century, and the island on which the seals breed to be undiscovered: can it be doubted that, in that state of things, there is a right to kill the seals in the manner called pelagic hunting? Can it be doubted? Then, if, at the end of a century, the island on which those seals breed, is discovered, does that which for a century was a right which all the world might exercise, cease to be a right, and does the mere fact that you have discovered the breeding place on those islands change that which was exercised by mankind in common as a right into a moral crime, an indefensible wrong, and all the rest of it?

Now, I say this is no ideal case; this is the actual case you are discussing, because it stands confessed that, till the year 1786, the Pribilof Islands were unknown, and it was in that year, for the first time, that it was discovered that they were a breeding place for seals. That is the statement of my learned friend, and the correct statement, so far as I know, historically. Up to that time all who had an interest to engage in this pursuit, namely the aboriginal inhabitants along the coasts, engaged in it; and is it to be said, can it be said, with any show of reason or justice, or with any warrant of law, that straight away the discovery of the breeding place of the seals deprived those who previously exercised the rights of pelagic sealing, or the industry of pelagic sealing, of those rights?

Now, I proceed with the main line of the argument at the point where I left off, and I had been stating (I had not got very far in stating it) when my learned friend, Mr Carter, interrupted me (I am not making any complaint of the interruption at all): he did not recognize the proposition which I was stating in order to combat it as one which he had advanced. I had not got, at the moment of his interposition, to the full statement of it; but I will cite it now, and will endeavour to show that I am justified in stating it as a proposition advanced by my learned friend and which I have to meet. I will state the proposition in two ways, because I find it stated with some variations. One is that only the usufruct of property

is recognized by law; and that, with the exception of a certain class of living creatures said to be inexhaustible, you can only take the superfluous males, and that you can exercise your right of usufruct only in such a way as not to interfere with the stock. And, in another place the proposition is stated in very much the same way, but in slightly different language; — that property in animals useful to mankind, exhaustible in their nature, is by law given to him who can best utilize such animals for the benefit of mankind by taking the increase and preserving the stock. I do not think that my learned friend will quarrel with that as being a pretty accurate statement of the propositions which he advanced?

Mr Carter. — The last is accurate; the first is ambiguous.

Sir Charles Russell. — I do not think it is ambiguous; but, however, he accepts the last as accurate.

Now, I should like to refer to the way this is illustrated in the argument of my learned friend, because I think I shall satisfy the Tribunal that he has here got out of the domain of law and into the domain of ethics, — that he has been relying upon the opinions of writers who have either been dealing with what the law ought to be, and the ethical principles which ought to permeate law and upon which it ought to be based; or he has got to metaphysical writers who have been struggling to find a metaphysical reason to account for the law, and who are not content to accept the law as it is.

Before I read these passages of my learned friend, I should like to make one preliminary observation. You observe the point of this proposition is that you are not to kill females; that you are to take the increase of males; that you are not to do anything which will diminish the birth-rate of the particular class of animals with which you are dealing.

Now, I want to know where has any municipal law of any country, except the special Statute of the United States in relation to female seals, prohibited the killing of females: — any municipal law, to begin with? I do not know of any. I know of no system of municipal law which lays down any such rule. I do know that, both in hunting and shooting, owners of land do exercise a certain discrimination in preserving a certain proportion of females; but whoever suggested that it would be wrong to kill a doe, or that it would be wrong to kill a hen-pheasant, or a hind, or wrong to kill any but cock-grouse or cock-pheasants?

There is no such principle that I know of to be found in any municipal law. Is there any such principle to be found in international law? Has international law ever affirmed in any shape or form the proposition that there was something intrinsically wrong, morally wrong, or criminal, in the fact of killing a female in any species of animal to be found any where on the face of the earth? I know of none.

Senator Morgan. — I think all the game laws applicable to what we call terrestrial animals — birds and deer and the like — have very distinct

reference to protecting the breeding season or nesting season. I suppose that is for the purpose of protecting the females that they may rear their young.

Sir Charles Russell. — I quite agree; undoubtedly, that is the object of a close season — not to interfere with the process of nature in producing their young; but there is no question of property involved; it is a question of municipal regulations. What I am now dealing with is this appeal to law — either municipal or international law — and herein I do not find any principal which treats it as a crime or a wrong to kill a female.

I want to follow this reference of my learned friend a little more. At page 58 of the printed Argument this point of usufruct is developed, and the whole argument at this point is addressed to ownership not being absolute. He is asking what is the extent of the dominion which is given by the law of nature to the owner of property. He there says.

In the common apprehension the title of the possessor is absolute, and enables him to deal with his property as he pleases, and even, if he pleases, to destroy it. This notion, sufficiently accurate for most of the common purposes of life, and for all controversies between man and man, is very far from being true. No one, indeed, would assert that he had a *moral* right to waste or destroy any useful thing; but this limitation of power is, perhaps, commonly viewed as a mere moral or religious precept —

So far I have nothing to say against it. We are in the region of moral law: we are in the region of ethics, and I have nothing more to say.

for the violation of which man is responsible only to his Maker, and of which human law takes no notice.

That, he says, is the common notion, but he goes on in the next sentence to say that it is a mistaken notion.

The truth is far otherwise. This precept is the basis of much municipal law, and has a widely-reaching operation in international jurisprudence.

Thus he immediately slips away from the domain of ethics, and he affirms that, though the common idea is that this is a merely moral law, as to which I agree, yet he apparently goes on to say it is a mistake to suppose it is not also law in the strict sense of that term. Then he puts this question of usufruct, and, in the second paragraph he says:

No possessor of property, whether an individual man, or a nation, has an absolute title to it. His title is coupled with a trust for the benefit of mankind.

That is his first proposition.

Second. The title is further limited. The things themselves are not given him, but only the *usufruct* or *increase*. He is but the custodian of the stock, or principal thing, holding it in trust for the present and future generations of man.

That may be all very well as a question of ethics. It is not law. I apply it to a concrete illustration straight away, to one indeed which is put by my learned friends themselves in argument; it shows how little faith they have in these vague general propositions. I affirm, as my learned

friends have affirmed, that the United States would have a right if they chose — a right in point of law, and no one could complain of their doing it except as an offence against the moral opinion of the world, if indeed it were such, — they would have a right to knock on the head every seal that came to the Islands; and my learned friends have claimed it, for they have, I will not say threatened, but suggested it to the Tribunal as a thing to weigh with it in arriving at its decision.

Mr Carter. — We have not asserted that right.

Sir Charles Russell. — I assure you I am well founded in what I say. If I am challenged on that, I will refer to the passage to-morrow morning.

The President. — Mr Carter says it was not an assertion of right. He has not asserted that right, but you are to take it as a hint.

Sir Charles Russell. — What is it if it is not an assertion?

The President. — Call it a hint.

Sir Charles Russell. — Very well, I will call it a hint. I certainly understood him to say — and he was well within his legal rights in saying it — that if this Tribunal did not help the United States to protect the seals for the benefit of mankind, so that the blessings of Providence might, through the agency of the United States, be distributed to mankind, that they would have the right, I think he went even further than that and said they would be justified — which is a wider word than right, for it would embrace moral considerations also — in knocking every seal on the head.

Now one other passage. At page 67 of the Argument, enlarging upon this topic and still upon the question of right to the usufruct merely, he says :

There are some exceptions, rather apparent than real, to the law which confines each generation to the increase or usufruct of the earth.

Mark the words he uses. And then he proceeds to give these exceptions : minerals, wild birds, and fish of the sea, which he describes as inexhaustible and outside this rule of usufruct. As regards that statement, I think it will be found that there is no such thing as any inexhaustible treasure of the earth or the sea; certainly in the case of fish it has been found, in the experience of many countries, necessary to restock the rivers and to try and replace various kinds of fish which have been exhausted.

Examination of assertion that there is only a right to the usufruct of property.

Now I say, so far, that I have justified myself; but my friend carries, quite logically, his argument still further; and from individuals restricted to usufruct (which I say is not the law), he passes on to the question of what nations may do with regard to their property or their possessions; and in the printed report of his argument, at page 399, my friend shows he is quite consistent, because he proceeds to lay down a series of extraordinary propositions to this effect : That if a particular nation produces a particular commodity the rest of the world can, as of right, compel that nation to part with its commodity for the benefit of the world. He

instanced the case of india-rubber; he instanced the case of tea. Why not instance the case of Bordeaux wine, or any other wine, or any other commodity? He says even that if the interests of a particular nation will not prompt it (as of course it will), to exchange its commodities for other commodities of the world, yet as a matter of international right, as a matter of law, a strong nation can take a weak nation, so to speak, by the throat, and compel it to sell its tea, compel it to sell its india-rubber, compel it to sell its wine; the argument I venture to think being a good deal damaged, when my friend felt compelled (in answer to a question addressed to him by one member of the Tribunal), to admit so much at least as this — that the nation which produced the particular commodity could fix its own price. My learned friend admitted it could fix its own price, but he put a qualification on that — “so long as it is not prohibitory”. Who is to be the judge of whether it is prohibitory or not? All this, I say, is enough to show the Tribunal that my learned friend is in all this discussion arguing as a great thinker, adopting the thoughts of great thinkers on ethical and metaphysical subjects, and applying ethics and metaphysics to law. He is not, at least I cannot imagine that he is, arguing as a lawyer to lawyers — as a judge to judges: he is in an atmosphere, and at a point of elevation, quite beyond my reach, or even, I will add, beyond the necessity of my even making the attempt to reach him except in the way I am now doing.

Now I say with reference to each of these propositions — I care not in what form they are stated, that they cannot be accepted merely because my friend is able to cite vague passages of theoretical writers, not dealing as I have said, with the matter, as lawyers, which would give some kind of colour, economically if you like, ethically if you like, to these views. I am addressing a Tribunal called upon to declare legal rights — that is common ground between us; and to support that position, therefore, my friend is bound to produce authority of lawyers, of judges, or to show (if he thinks that international law has any application to the subject matter), that international law has either laid down a principle within which his contention clearly falls, or has adopted a concrete rule applicable to this case. I say he has done neither the one nor the other; and if one comes to the basis of his argument, one fails to see why, if there be any principle in it at all, it is to be confined to *one* class of animals. Why is it to be confined to animals at all? If usufruct only of property is to be allowed, why may a man eat up all his capital?

I presume my friend will not deny that there is no law which compels a man merely to live upon the usufruct of his capital estate — that there is no law which compels him to live only upon the interest of his invested money — that he may eat up his capital if he pleases; and yet my friend's argument, and the authorities he cites, show that he is embracing within this comprehensive principle even the case I am putting, for he cites economic writers to show that abstinence, or self restraint, or frugality —

abstinence from spending is the defence which these ethical writers make for the accumulation of capital.

Now, Mr President, I cannot think that this helps us very much, nor, so far as this particular case is concerned, do I see that it helps us at all. Suppose there are three persons or nations who are interested — to take the concrete case of pelagic sealing — three nations, the American, the Russian and the Canadian people : suppose further that the home of the seals is still undiscovered ; that they are only known to frequent these seas at particular times of the year ; that these three nations each pursue the seals in the sea : but that none of them pursue them economically — all aiming at destroying the stock : are all to be restricted according to my friend, or which is to be restricted ? If all are on an equality as to wastefulness, or if all are on an equality as to economic use, whose is the right to take ? or have none the right to take, or are all excluded ? And how are you to determine it, if all three are equally economic : — whose is the right, or whose is the property ? The truth is that these vague propositions afford no guide and no help at all to the elucidation of the particular matter in question. It looks to me, indeed, as if this proposition, that property in animals useful to mankind, exhaustible in their nature, is to vest in him who can best utilize such animals and preserve the stock, was a proposition invented to meet the case of fur-seals, invented for the occasion, and ingeniously invented for the purpose of evading the difficulties which stared my friend in the face. I say, therefore, Mr President, as regards the whole of this matter, and the whole of the argument addressed to these propositions, that while they have a certain academic interest they have only an academic interest ; they do not assist this Tribunal in determining the question before us ; and, pushed to its legitimate result, even if there be a principle of ethics or economics in it at all, it would result in the affirmation of a principle that property should be attributed to him, or to the nation, that can best turn it to account : a proposition of a very wide character, which would lead to the transfer of a good deal of the world's possessions from the hands that now possess them to others, but for which no warrant is to be found in any system of jurisprudence that I am aware of, and which international law has never even made any approach to recognizing. Let me say in this connection — I shall have to say something about it a little later — that while my friend is quite logical if his original position is correct, namely, that the law of nature and the law of morals are the same as international law — while my friend is quite logical if that first proposition is made out, the superstructure that he has built on that first proposition falls to the ground if that original position is not made out. I say that original position is not made out. I have already dealt with this before in general language — that the moral law and the natural law are not international law, but only so much of them as have been taken up into international law, and adopted with the consent of nations. And I would put this practical test. Can my friends, or can the erudition of any member

of this Tribunal refer to any case of international controversy that has ever been decided by a direct appeal either to the law of nature or to the moral law? I say there is none. The moral law, and the law of nature, of course, have been great factors in the formation of international law, but they are not international law; and I say there is no controversy — of course I speak subject to correction — which can be referred to upon the question of right between nations, which has ever been determined by direct reference either to the moral law or to the law of nature.

Senator Morgan. — You remember, Sir Charles, that in the Treaty between Great Britain and the United States, the Treaty of Washington in 1871, the two Governments failed to agree as to what the international law was in its application to the alleged fitting out of those cruisers, and so forth. That they agreed upon three distinct propositions or rules of right to operate between the two Governments in respect of their controversy. They could not agree on them as propositions of international law, but they were so obviously just and proper that they made an agreement in the same Treaty that hereafter those three propositions should stand for international law between the two Governments.

Sir Charles Russell. — I have no doubt they showed their good sense.

Senator Morgan. — I have no doubt they did.

Sir Charles Russell. — But what were they doing?

Senator Morgan. — Making international law.

Sir Charles Russell. — With great deference, supplying the absence of international law.

Senator Morgan. — That is what I mean.

Sir Charles Russell. — Doing by Convention that which international law did not do.

Senator Morgan. — That is what I mean.

Sir Charles Russell. — And in truth that is the subject which must engage your attention a little later when I come to another branch of this case, that the fact is, there being no international law upon this question, the place of international law is determined by Convention, which so far as this Tribunal is concerned gets another name — “ Regulations ”.

But now I turn from these vague propositions (as I must respectfully call them, while I am sure I do not desire otherwise than to express my admiration for the learning and ability of my friend), with a certain sense of relief to see whether, when we come to definite authority, my friend is able to produce anything definite in support of his views; and when I come to these authorities what do I find? that of the authorities cited, *all* of them support the argument of Great Britain, some of them indeed are referred to in it; and to the examination of those authorities I now invite the attention of this Tribunal.

EXAMINATION OF AUTHORITIES CITED BY THE UNITED STATES

The authorities cited in the Argument of the United States are to be found at page 108. They begin with a citation from “ Studies in the Roman law ” by Lord Mackenzie.

Deer in a forest, rabbits in a warren, fish in a pond, or other wild animals in the keeping or possession of the first holder cannot be appropriated by another unless they regain their liberty, in which case they are free to be again acquired by occupancy. Tame or domesticated creatures, such as horses, sheep, poultry, and the like, remain the property of their owners, though strayed or not confined. The same rule prevails in regard to such wild animals already appropriated as are in the habit of returning to their owners, such as pigeons, hawks in pursuit of game, or bees swarming while pursued by their owners.

All perfectly sound — pigeons for whom a dovecote is provided, who are supplied with food and induced to return not merely to a particular place, but to fly for the shelter of home to a particular place. So hawks, trained by great effort and labour, to fly game and return to the wrist or shoulder of the owner. So bees, naturally wild, but which in a swarm are captured, put into an artificial hive, supplied with food to commence their saving operations, — supplied with mechanical contrivances to aid them in the construction of their combs — it is of these last you will properly say that there is qualified property in them : that that property is not lost when they temporarily disappear. It is in fact only lost when they have definitely lost their habit of returning, and have resumed their former wild state.

An extract from Gaius’ Elements of Roman Law follows, which I do not think I need trouble to read, as it is to the same effect. There is then a quotation from Von Savigny on Possession. The second paragraph is this.

Wild animals are only possessed so long as some special disposition (*custodia*) exists which enables us actually to get them into our power. It is not every *custodia*, therefore, which is sufficient ; whoever, for instance, keeps wild animals in a park, or fish in a lake, has undoubtedly done something to secure them, but it does not depend on his mere will, but on a variety of accidents whether he can actually catch them when he wishes, consequently, possession is not here retained.

How completely that applies !

When these animals are on the Islands the lessees have the capacity to knock a great many of them on the head and so get possession and capture them ; but the moment they go away to sea, they are beyond all human control. And further it is impossible — (as I have pointed out already it makes the case of the seals *a fortiori*), to keep them in that continuous confinement which is possible in the case of purely terrestrial animals, because if they are kept on land they die.

Now about the *animus revertendi* I read from the bottom of page 108 from Savigny.

Wild beasts tamed artificially —

That is to say habituated by art, custom, contrivance and teaching of man.

Wild beasts tamed artificially, are likened to domesticated animals so long as they retain the habit of returning to the spot where their possessor keeps them.

The doves in a dove-cot, the bees in a hive, the hawk, are taught to go and to return — they are artificially tamed.

The next writer cited is Puffendorf, who is one of the class which I may call metaphysical writers, no doubt of great distinction, but one who is always seeking, as I shall show you — (judged not by my statement, I need not say, but by the statements of critical men of authority) — for some metaphysical reason to justify the existence of a particular law. This illustration of his method occurs to my mind from the reading of it. He explains the right which he admits to exist in all the nations of the world, to take all they choose to get or can get from the high sea; and he explains it upon the reason that the products of the sea are inexhaustible. Well, that may or may not be a metaphysical foundation for the law, but it clearly is not a reason of the law. When nations began to exercise their rights on the high seas, they never asked one another, in settling their mutual rights, if the things they were pursuing were or were not inexhaustible? They pursued them on the high sea because those things were the common property of mankind, and because there was no exclusive right of any one in the sea: because upon the great Ocean all were equal. That I think is a fair illustration of the value of Puffendorf's statements.

Then on page 109 there is a citation from Bracton which I think my friend did not read.

The dominion over things by natural right or by the right of nations is acquired in various ways. In the first place, through the first taking of those things which belong to no person, and which now belong to the King by civil right, and are not common as of olden time, such, for instance, as wild beasts, birds, and fish, and all animals which are born on the earth, or in the sea, or in the sky, or in the air; wherever they may be captured and wherever they shall have been captured, they begin to be mine because they are coerced under my keeping, and by the same reason, if they escape from my keeping, and recover their natural liberty they cease to be mine, and again belong to the first taker. But they recover their natural liberty, then, when they have either escaped from my sight in the free air, and are no longer in my keeping, or when they are within my sight under such circumstances, that it is impossible for me to overtake them.

Occupation also comprises fishing, hunting, and capturing; pursuit alone does not make a thing mine, for although I have wounded a wild beast so that it may be captured, nevertheless it is not mine unless I capture it. On the contrary it will belong to him who first takes it, for many things usually happen to prevent the capturing it. Likewise, if a wild boar falls into a net which I have spread for hunting, and I have carried it off, having with much exertion extracted it from the net, it will be mine, if it shall have come into my power, unless custom or privilege rules to the contrary. Occupation also includes shutting up, as in the case of bees, which are wild by nature, for if they should have settled on my tree they would not be any the more mine, —

on his land still — on his tree :

until I have shut them up in a hive, than birds which have made a nest in my tree, and therefore if another person shall shut them up, he will have the dominion over them. A swarm, also, which has flown away out of my hive, is so long understood to be mine as long as it is in my sight, and the overtaking of it is not impossible, otherwise they belong to the first taker; but if a person shall capture them, he does not make them his own if he shall know that they are another's, but he commits a theft unless he has the intention to restore them. And these things are true, unless sometimes from custom in some parts the practice is otherwise.

What has been said above applies to animals which have remained at all times wild; and if wild animals have been tamed, and they by habit go out and return, fly away, and fly back, such as deer, swans, sea-fowls, and doves, and such like, another rule has been approved, that they are so long considered as ours as long as they have the disposition to return; for if they have no disposition to return they cease to be ours.

I have already pointed out that Savigny expresses the true meaning of the word “ habituated ” to return, or “ accustomed ” to return, when he describes it as the taming of the animal artificially.

Then, on page 110, there is a citation from Bowyer, a most respectable gentleman but not admitted amongst the highest authorities, I think, but entirely in our favor. Sir George Bowyer is known to some of the Arbitrators, I know. He is known to Lord Hannen I am sure, and known to me very well, and to my friends. In the second paragraph of the citation he says :

When you have caught any of these animals it remains yours so long as it is under the restraint of your custody. But as soon as it has escaped from your keeping and has restored itself to natural liberty, it ceases to be yours and again becomes the property of whoever occupies it. The animal is understood to recover its natural liberty when it has vanished from your sight, or is before your eyes under such circumstances, that pursuit would be difficult.

Then in the middle of the next page 111, he says :

The general principle respecting the acquisition of animals, *feræ naturæ*, is that it is absurd to hold anything to be a man's property which is entirely out of his power.

and so on.

Then the edition of the Institutes of Justinian, of Cooper, is referred to at page 112.

Section 12. *De Occupatione Ferarum*. — Wild beasts, birds, fish, and all animals, bred either in the sea, the air, or upon the earth, so soon as they are taken, become by the law of nations, the property of the captor.

I ought to say, I think, with great deference, it is hardly correct to say there « the law of nations. » It really is, *jus gentium*. I suppose what really is meant there is the law of *particular* nations. — It is not the *jus inter gentes*, which is referred to; it is the *jus gentium*.

The President. — I believe from my recollection of Roman law *jus gentium* meant natural law.

Sir Charles Russell. — The laws common to those nations which were known to the Romans.

The President. — The Romans, of course, were not considered as having any international law.

Sir Charles Russell. — Then the Case of the Swans — (7 Coke, 15 b.), is pointed on page 113. The swan being one of the animals reckoned a royal bird, the keeping of it required a royal franchise. The technical phrase is the keeping of a “ game ” of swans. As we all know, swans are marked, and this case really goes further in one sense against the contention of my friend than he seems to suppose, because at the top of page 114 it is said :

It was resolved that all white swans not marked, which have gained their natural liberty, and are swimming in an open and common river, might be seized to the King’s use

But how?

by his prerogative, because *Volatilia (quæ sunt feræ naturæ) alia sunt regalia, alia communia*;... as a swan is a royal fowl; and all those, the property whereof is not known, do belong to the King by his prerogative; and so whales, and sturgeons, are royal fish, and belong to the King by his prerogative.

But it was resolved also that the subject might have property in white swans not marked, as some may have swans not marked in his private waters, the property of which belongs to him and not to the King; and if they escape out of his private waters into an open and common river, he may bring them back and take them again. And therewith agreeth Bracton.

Then he goes on :

But if they have gained their natural liberty, and are swimming in open and common rivers, the King’s officer may seize them in the open and common river for the King; for one white swan without such pursuit as aforesaid can not be known from another; and when the property of a swan can not be known, the same being of its nature a fowl royal, doth belong to the King.

I do not think I need trouble by reading that authority further. Then on page 115 there is a reference to the case of *Child v. Greenhill*, (3 Croke, 553).

Trespass for entering and breaking plaintiff’s close and fishing and taking fish in his several fishery. Contended for the defendant that he could not say “ his ” fishes, for he hath not any property in the fish until he takes them and has them in his possession. Attorneys for plaintiff maintained that they were in his several fishery, and that he might say “ his ” fishes, for there was not any other that might take them, and all the court was of that opinion.

Now this is a matter which, Lord Hannen will forgive me for saying so, requires a word of explanation, for I doubt if it would otherwise be intelligible to those members of the Tribunal who are not acquainted with the technical rules of pleading. The question arose on demurrer; that is to say, the plaintiff was complaining that he, being the owner of a several fishery, the defendant broke and trespassed and took and carried away his fish, whereupon the defendant pleaded — You cannot say they are “ your ” fish, because they are not in your possession; they were merely in your pond, or your fishery; and, therefore, you cannot say — it is erroneous to say, as a matter of law and pleading — they are “ your ” fish at all. The complaint being trespass on the fishery, the Court there-

upon decides that, if they were nobody else's fish, they certainly were not the defendant's who is breaking and entering; and on the question of pleading, that the pleading is not bad which complains of trespass of the several fishery, merely because it states these fish are the property of the plaintiff. That is the whole case.

The case of *Keeble v. Hickeringill* is next cited. This I shall refer to, because it is not set out in the citation at page 115 quite fully, and I have, therefore, the report before me. The report is in the note to 11 East's Reports, at page 573. It was decided in the year 1809.

Now this was the case and it is an important case. The Plaintiff had erected at his own expense upon his own land, or upon the water in his own land, a decoy : — decoys were at one time a considerable industry in various places — in order to attract ducks to that decoy; and his complaint was that the Defendant, intending to injure him, and maliciously, not in exercise of a right of his own, or for purposes of his own, but maliciously, had fired guns in the neighbourhood of that decoy, in order to frighten the ducks away from it, and the question was whether that was or was not a good cause of action. The ducks attracted to the decoy were, of course, wild ducks in which the Plaintiff could claim no property, and did claim no property till he had actually shot them or captured them. His complaint was not that, but that the Defendant had done that maliciously to injure him not in the exercise of any right, but with a view to disturbing him, the Plaintiff, in reaping the benefit of his decoy : and the question was whether that gave him a cause of action.

There is so much to say, and I am anxious to get over the ground, that I will read only enough to bring out that point.

Action upon the case. Plaintiff declares that he was, on the 8th of November in the second year of the Queen, lawfully possessed of a close of land and a decoy upon it, to which wild fowl used to resort; and the Plaintiff had at his own costs and charges prepared and procured divers decoy-ducks, nets, machines, and other engines for the decoying and taking of the wild fowl, and enjoyed the benefit in taking them. The defendant, knowing which and *intending to damnify the Plaintiff* in his vivary, and to fright and drive away the wildfowl used to resort thither, and deprive him of his profit, did, on the 8th of november, resort to the head of the said pond and vivary and did discharge six guns laden with gun-powder, and with the noise and stink of the gunpowder did drive away the wildfowl then being in the pond; and on the 11th and 12th days of November the Defendant, *with design to damnify* the Plaintiff and fright away the wildfowl, did place himself with a gun near the vivary.

And so on, and Chief Justice Holt, a Judge of great authority, deals with the matter thus —

When a man useth his art or his skill to take them to sell and dispose of for his profit, this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so?

And so on ;

But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But if a man doth him damage by using the same employment; as if Mr Hickeringill had set up another decoy on his own ground near the Plaintiff's, and that had spoilt the custom of the Plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the Plaintiff.

The action was simply brought against the Defendant for an act not purporting to be done in exercise of a right of his, but *maliciously* done in order to injure and damnify the Plaintiff.

Lord Hannen. — At page 116 in the “ Modern Report ”, the antithesis is brought out very clearly.

Suppose the Defendant had shot in his own ground, if he had occasion to shoot, it would be one thing, but to shoot on purpose to damage the Plaintiff is another thing and a wrong.

Sir Charles Russell. — Quite so. The appositeness is clear enough, because the Tribunal will see, whatever else has been said about pelagic sealers, there is one thing that has not been said, and could not be said, and that is this : that these pelagic sealers, largely American and largely Canadian, were pursuing pelagic sealing maliciously intending to injure anybody. They were pursuing what they considered to be a right, and they were pursuing this mode of capture or industry in order to earn the profit which accrued to them from its pursuit.

Now I turn to the case of *Amory v. Flynn*. But, why these cases have been cited, I do not know. It sometimes has come into my mind that my learned friend, with the multiplicity of affairs which no doubt occupied him, turned some intelligent student into a library to copy wholesale passages and pages which have some remote bearing on the case.

Lord Hannen. — But some of them have a considerable bearing, and may have been put in out of fairness as being authorities against them.

Sir Charles Russell. — Well, my Lord, I withdraw what I said. My learned friends have been good enough to supply us with them, and I withdraw what I said, and I ought not properly to have said it.

What is this case? It is a case in which one Amory brought an action of trover against Flynn before the Justice for two geese : It is an American case and is reported in 10 Johnson's Reports.

The plaintiff proved a demand of the geese and a refusal by the defendant unless the plaintiff would first pay 25 cents for liquor furnished to two men who had caught the geese and pledged them to the defendant for it.

The geese were of the wild kind, but were so tame as to eat out of the hand. They had strayed away twice before, and did not return until brought back. The plaintiff proved property in them, and that after the geese had left his premises, the son of the defendant was seen pursuing them with dogs and was informed that they belonged to the plaintiff.

In other words, they were tame geese, and that is what the Court said.

Per curiam. The geese ought to have been considered as reclaimed so as to be the subject of property. Their identity was ascertained; they were tame and gentle, and had lost the power or disposition to fly away. They had been frightened and chased by the defendant's son, with the knowledge that they belonged to the plaintiff, and the case affords no colour for the inference that the geese had regained their natural liberty as wild fowl and that the property in them had ceased.

Again, on page 117 is the case of *Goff v. Kilts*; that is also an American authority, reported in 15th Wendell's Reports.

The owner of *bees* which have been reclaimed

mark the word "*reclaimed*" —

may bring an action of *trespass* against a person who cuts down a tree into which the bees have entered *on the soil of another*, destroys the bees and takes the honey.

Where bees take up their abode in a tree, they belong to the *owner of the soil*, if they are *unreclaimed*, but if they have been *reclaimed*, and their owner is able to identify his property, they do not belong to the owner of the soil, but to him who had the former possession, although he cannot enter upon the lands of the other to retake them without subjecting himself to an action of trespass.

The only point on that which I should have thought was a little doubtful, but which I think is not material here, is where he says it belonged to the owner of the tree. I do not think myself that that would be quite so. It merely means, I think, they belonged to him in the sense that he would have the right to take them.

Mr Carter. — The case does not decide it.

Sir Charles Russell. — No. I am much obliged to my learned friend; it is really a mistake. It is the headnote by the reporter of the case, and not the Judgment. I have the reports here, and they are at the service of any Members of the Tribunal who desire to look at them.

Then it proceeds.

Error from the Madison Common Pleas. Kilts sued Goff in a justice's court in *trespass* for taking and destroying a swarm of *bees*, and the honey made by them. The swarm left the hive of the plaintiff, flew off and went into a tree on the lands of the Lenox Iron Company. The plaintiff kept the bees in sight, followed them, and marked the tree into which they entered.

This was obviously a swarm which the Plaintiff had hived; he was able to identify them; he keeps them in sight, follows them, and marks the tree into which they enter.

Two months afterwards the tree was cut down, the bees killed, and the honey found in the tree taken by the defendant and others. The plaintiff recovered judgment, which was affirmed by the Madison Common Pleas. The defendant sued out a writ of error.

By the Court, Nelson, J. : Animals *feræ naturæ*, when reclaimed by the art and power of man —

That is the true doctrine of reclamation :

are the subject of a qualified property; if they return to their natural liberty and wildness, without the *animus revertendi*, it ceases. During the existence of the qualified property, it is under the protection of the law the same as any other property, and every invasion of it is redressed in the same manner. *Bees* are *feræ naturæ*, but when hived and reclaimed, a person may have a qualified property in them by

the law of nature, as well as the civil law. Occupation, that is hiving or inclosing them, gives property in them. They are now a common species of property, and an article of trade, and the wildness of their nature, by experience and practice, has become essentially subjected to the art and power of man. An unreclaimed swarm, like all other wild animals, belongs to the first occupant — in other words, to the person who first hives them; but if the swarm fly from the hive of another, his qualified property continues so long as he can keep them in sight, and possesses the power to pursue them.

That is all I think that I need read of that case.

Now, the case of *Blades v. Higgs* is on page 119; and I have the report of that case here also. It was decided by the House of Lords in 1865. You will find it reported in the 11th “House of Lords’ Cases”, at page 621. The sole question in the case was this; — Was the property in certain rabbits killed by a trespasser on the land of another person, in the man who killed them, or were the dead rabbits the property of the man on whose land they were killed? And I yesterday stated, subject to being corrected by the Marquis Venosta if I am wrong, that, according to the Roman Law, the actual taker, though a trespasser, would have the right of property; wherein the American and the English Law differ from the Roman Law. The sole question, therefore, in the case was, to which of two persons did the property belong? The rabbits were shot, and the question was, to whom they belonged?

Now, Lord Chancellor Westbury, at page 631, thus states the law.

My Lords, when it is said by writers on the common law of England that there is a qualified or special right of property in game, that is in animals *feræ naturæ* which are fit for the food of man, whilst they continue in their wild state, I apprehend that the word “property” can mean no more than the exclusive right to catch, kill and appropriate such animals, which is sometimes called by the law a reduction of them into possession. This right is said, in law, to exist *ratione soli* or *ratione privilegii*, for I omit the two other heads of property in game which are stated by Lord Coke, namely *propter industriam* and *ratione impotentix*, for these grounds apply to animals which are not in the proper sense *feræ naturæ*. Property *ratione soli* is the common law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the soil.

Then further on he continues :

The question in the present case is whether game found, killed, and taken upon my land, by a trespasser becomes my property as much as if it had been killed and taken by myself, or my servant by my authority. Upon principle there cannot, I conceive, be much difficulty. If property in game be made absolute by reduction into possession, such reduction must not be a wrongful act, for it would be unreasonable to hold that the act of the trespasser, that is of a wrongdoer, should divest the owner of the soil of his qualified property in the game, and give the wrongdoer an absolute right of property to the exclusion of the rightful owner.

But in game, when killed and taken, there is absolute property in some one, and, therefore, the property in game found and taken by a trespasser on the land of A. must vest either in A. or the trespasser; and, if it be unreasonable to hold that the property vests in the trespasser or wrongdoer, it must of necessity be vested in A., the owner of the soil.

Then he proceeds to the conclusion that it vested in the owner of the soil.

In this connection an erroneous reference I think is made by my learned friends in note in their printed Argument attributing I think to Lord Chelmsford what in point of fact I think Lord Chelmsford did not say. The note is on page 54.

Lord Chancellor Chelmsford made the proposition that every thing must be owned by some one, the ground of his decision in the House of Lords in the case of *Blades v. Higgs*.

I think that will not be found to be quite correct.

Mr Carter. — I should say it was entirely correct from what you have read.

Sir Charles Russell. — I have not yet read Lord Chelmsford.

Lord Hannen. — He uses a phrase which Mr Carter thinks is equivalent.

Sir Charles Russell. — I quite agree, applied to the particular case it is the equivalent of it, and it is quite right, but the statement is attributed to Lord Chelmsford.

Lord Hannen. — It is not a general proposition; it is with regard to the facts of the particular case.

Sir Charles Russell. — Quite so, it is not worth dwelling upon. The general proposition that everything must be owned by somebody is attributed to Lord Chelmsford.

Lord Hannen. — I have opposite to my note on that “ page 119 ”; there may be something there.

Sir Richard Webster. — That is where it is noted in the Appendix later on.

Sir Charles Russell. — Yes that is the page I have now got to in the Argument. It is not worth dwelling upon. The Judges agree in saying the rabbits which were killed were wild : they were killed by a trespasser on the land of A, and the question was whose is the property? And contrary to the Roman law they arrived at the conclusion that the property was not the trespasser's, but that of the man on whose land it was killed.

The President. — Before you leave that subject, will you allow me to put a question relating to one of the earlier cases because I should like to know your explanation.

Sir Charles Russell. — On what page is it?

The President. — It is about the white swans on page 114. There is this, that property vested in the King by reason of his prerogative because —

Volatilia (quæ sunt feræ naturæ) alia sunt regalia, alia communia.

Well of course instead of “ *volatilia* ” you might use *animalia* in general. Would you consider that, in the case of the white swans, this property vindicated by the King of England would go beyond the limits of the jurisdictional power of the King of England — would you consider that

as a right of absolute property, which might be vindicated even abroad out of the limits of the realm?

Sir Charles Russell. — I should like to consider that, Baron, if you think it important; but I should have thought not.

The President. — Yes I should like to have some explanation of it. If you like to think of it by to-morrow please do so.

Senator Morgan. — Do you mean, Mr President, going outside the realm?

The President. — Yes, with reference to the question you put before.

Senator Morgan. — If the Government has the right by its municipal laws to appropriate to itself all property that does not belong to anybody else it does not necessarily follow that that right must be recognized by other nations.

The President. — Well, Sir Charles, perhaps you will be kind enough to think of it.

Sir Charles Russell. — Yes, I should say, as regards the nationals of the particular country, that the legislative power might decree anything it pleased as regards property in white swans or anything else wherever that property was, in any part of the world, as regards subjects or nationals; but so far as legislation could affect anything outside the territory, so far as foreigners are concerned, I should have supposed it could not affect them outside the realm.

Senator Morgan. — The question, to my mind, arose more particularly in respect to that part of the three propositions submitted in Article I of the Treaty, relating to the right of pelagic hunting, as we call it, the right of taking seals. It includes and makes it incumbent upon the Arbitrators to decide as to the rights of the citizens and subjects of both countries, not one but both. Well, it is a material fact that the United States have asserted and acquired property by their municipal laws in the fur-seals within their recognized jurisdiction. When the seals are beyond that jurisdiction, then the Tribunal has to decide whether the citizens of the United States have the right to take those seals although they are appropriated to the Government of the United States, and their taking within the jurisdictional limits of the United States is prohibited under severe penalties. It is a peculiar attitude as the case is stated here, and one that has given me some concern.

Sir Charles Russell. — May I point out, Senator, there seems to be a fundamental error of fact in the statement you have made, because the United States never has, by its legislation, asserted property in the fur-seals.

Senator Morgan. — We differ as to that, you see.

Sir Charles Russell. — Well, I shall be glad to be referred to any place where they have asserted property. They have asserted an exclusive right of legislation in the eastern part of Behring Sea. They have, by that legislation, claimed to exclude all persons from the pursuit of pelagic sealing in that area; but they have never by legislation, or by judgment

in any of the Courts, affirmed property in the fur-seal either in the United States or in anybody else.

The President. — That is a question of fact which may be different from the other, but I would like to know your opinion on the question of right in the case of swans. It is not absolutely irrelevant, I think, and I should like to hear your observations about it.

Sir Charles Russell. — Certainly, Sir.

I will only trouble the Tribunal by reading one more passage from the judgment of Lord Chelmsford, on page 638 of the Report.

With respect to wild and unreclaimed animals, therefore, there can be no doubt that no property exists in them so long as they remain in the state of nature. It is also equally certain that when killed, or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property, absolutely when they are killed, and in a qualified manner when they are reclaimed?

That is to say, when they are reclaimed the property is qualified and not absolute. If they escape again, the property is gone.

The next case is the very long case of Morgan and the executors of Lord Abergavenny against the Earl of Abérgavenny. I have here the report of that case in full as it is reported in the 8th Common Bench Reports at page 768.

This case of Lord Abergavenny covers a good many pages in the printed Argument; but the point may be stated very briefly. The short point was this: If certain deer were wild and unreclaimed, they did not pass to the personal representatives of the late owner. If they were reclaimed so as to be in the category of domesticated animals, they did pass to the representative of the late owner. That is the short point. I will read first of all what the jury found. The facts are stated in various ways:

These deer were fed. They were described as to their habits as being to a large extent at least tame, some shy and timid. The report continues:

That they very rarely escaped out of the boundaries; that they were attended by keepers, and were fed in the winter with hay, beans and other food; that a few years back a quantity of deer had been brought from some other place and turned into Eridge Park; that the does were watched, and the fawns, as they dropped, were constantly marked, so that their age at a future time might be ascertained; that, at certain times, a number of deer were selected from the herd, caught with the assistance of dogs, and were put into certain parts of the park, which were then inclosed from the rest, of sufficient extent to depasture and give exercise to the selected deer, which were fattened and killed, either for consumption, or for sale to venison dealers; that the deer were usually killed by being shot; that there was a regular establishment of slaughter houses, for preparing and dressing them for use.

Those are all the facts I need trouble you with.

The jury found that the place was an ancient park with all the incidents of a legal park: Secondly, that the boundaries of the ancient park could be ascertained. They expressed a wish to abstain from finding for either plaintiffs or defendant; but upon being required to do so, they found a

verdict for the plaintiffs, and stated that the animals had been originally wild, but had been reclaimed. Therefore the jury found that they were reclaimed animals — originally in the class of wild animals, but reclaimed.

Then the rule came on for argument. I read now from the judgment.

The President. — Does it appear that those deer were selected and shut up to be fattened?

Sir Charles Russell. — Oh no ; the question arose as to all the deer, some of whom were shut up and fattened. The report continues : —

The rule came on to be argued in Easter term, 1848; and it appeared, upon the discussion, that the objection that no sufficient verdict had been found by the jury, had been urged upon a misapprehension of what the jury had said.

The judgment of the court was delivered by Mr Justice Maule, the argument having been heard before Chief Justice Wilde, Mr Justice Coltman, and Mr Justice Creswell : and the learned Judge said.

The second objection [to the summing up of the Judge] was that the Judge had misdirected the jury; and it was contended, in support of that objection, that the Judge must be held to have misdirected the jury in having omitted to impress sufficiently upon them the importance of the fact of the deer being kept in an ancient legal park. But the judge *did* distinctly direct the attention of the jury to the fact of the deer being in a legal park, if such should be their opinion of the place, as an important ingredient in the consideration of the question whether the deer were reclaimed or not, when he directed them that the question whether the deer had been reclaimed, must be determined by a consideration, among the other matters pointed out of the nature and dimensions of the park in which they were confined; and we do not perceive any objectionable omission in the Judge's direction in this respect, unless the jury ought to have been directed that such fact was conclusive to negative the reclamation of the deer.

Then he proceeds to deal with the facts, and he says :

It is not contended that there was no evidence fit to be submitted to the jury, and that therefore the plaintiff ought to have been nonsuited; but it is said that the weight of the evidence was against the verdict.

He deals with that question thus :

In considering whether the evidence warranted the verdict upon the issue, whether the deer were tamed and reclaimed, the observations made by Lord Chief Justice Willes in the case of *Davies v. Powell* are deserving of attention. The difference in regard to the mode and object of keeping deer in modern times, from that which anciently prevailed, as pointed out by Lord Chief Justice Willes cannot be overlooked. It is truly stated, that ornament and profit are the sole objects for which deer are now ordinarily kept, whether in ancient legal parks, or in modern inclosures, so called; the instances being very rare in which deer in such places are kept and used for sport: indeed, their whole management differing very little, if at all, from that of sheep, or of any other animals kept for profit. And in this case, the evidence before adverted to, was, that the deer were regularly fed in the winter: the does with young were watched; the fawns taken as soon as dropped, and marked; selections from the herd made from time to time, fattened in places prepared for them, and afterwards sold or consumed, — with no difference of circumstance than what attached, as before stated, to animals kept for profit and food.

As to some being wild, and some tame, it is said, — individual animals, no doubt, differed, as individuals in almost every race of animals are found, under any circumstances, to differ in the degree of tameness that belongs to them. Of deer

kept in stalls, some would be found tame and gentle, and others quite irreclaimable, in the sense of temper and quietness.

Upon a question whether deer are tamed and reclaimed, each case must depend upon the particular facts of it; and, in this case, the Court think that the facts were such as were proper to be submitted to the jury; and, as it was a question of fact for the jury, the Court cannot perceive any sufficient grounds to warrant it in saying that the jury have come to a wrong conclusion upon the evidence.

I therefore wish to point out that all that case really shows is that, upon certain evidence, it was submitted as a question of fact to a jury, who are, according to the English system of jurisprudence, charged with the determination of questions of fact, whether or not, in the circumstances of the particular case, the deer in question belonged to the category of wild and unreclaimed deer, or belonged to the category of tamed and reclaimed deer; whether in fact in the opinion of the jury they were tamed and reclaimed. The jury found that in fact they were tamed and reclaimed. That is the whole case.

Next we have the case of *Davies v. Powell*, which is reported in Willes' Reports. It was decided in 1737, long previous to the case last mentioned; in the middle of the last century. This was of the same class of cases for which I must be forgiven for uttering one word of explanation. This was also on demurrer. It is found on page 126 of the United States Argument :

Trespass for breaking and entering the close of the plaintiff called Caversham Park, containing 600 acres of land, etc., for treading down the grass, and for chasing, taking and carrying away *diversas feras, videlicet*, 100 bucks, 100 does and 60 fawns of the value of £ 600 of the said plaintiff *inclusas et coarctatas* in the said close of the plaintiff.

You will see therefore that the plaintiff was complaining that these 100 bucks, does, etc. which he said were his, were *inclusas et coarctatas* in the close of the plaintiff.

Lord Hannen. — Can you explain the use of that Latin. It was long after Latin had been used in that way.

Sir Richard Webster. — As late as the middle of the last century I think some words were still used in certain portions of the pleadings.

Lord Hannen. — That is the explanation I had given of it, that certain phrases were used.

Sir Charles Russell. — Yes; certain words of art were used in the Latin tongue. I think that is the explanation. But the question here was : Whether they were distrainable for rent which the plaintiff owed to his landlord, Lord Cadogan : and if they were the plaintiff's property they were distrainable for rent, but if they were not the plaintiff's property, if they were animals *feræ naturæ* and wild, then they were not distrainable; but he was complaining that they had been seized to pay the rent he owed, and he described them as his own bucks and his own fawns, as *inclusas et coarctatas* in his close.

This is again raised on demurrer. That is to say the plaintiff having made this complaint, the defendant pleads, " I seized them for

rent. Admitting all your facts, I seized them for rent"; whereupon a demurrer to that defence. If you will turn to page 127, the matter explains itself pretty well. It is the second paragraph :

To this plea the plaintiff demurs generally, and the defendants join in demurrer.

The technical effect of that, Mr President, is this : That the plaintiff says : Although I admit that the facts you set up in the defence are true in fact, I deny that in point of law they afford an answer to my claim.

That is the effect of the demurrer. Then the report goes on :

And the single question that was submitted to the judgment of the court is whether these deer under these circumstances, as they are set forth in the pleadings were distrainable or not. It was insisted for the plaintiff that they were not;

(1) Because they were not *feræ naturæ*, and no one can have absolute property in them.

(2) Because they are not chattels, but are to be considered as hereditaments and incident to the park.

(3) Because if not hereditaments, they were at least part of the thing demised.

(4) Their last argument was drawn *ab inusitato*, because there is no instance in which deer have been adjudged to be distrainable.

Then the argument is set out. The judgment of the Chief Justice is given. He says:

I do admit that it is generally laid down as a rule in the old books that deer, conies, etc., are *feræ naturæ*, and that they are not distrainable; and a man can only have a property in them *ratione loci*.

"*Ratione loci*" is only another way of saying *ratione soli*.

And therefore in the case of swans (7 Co. 15, 16, 17, 18) and in several other books there cited it is laid down as a rule that where a man brings an action for chasing and taking away deer, hares and rabbits, etc., he shall not say *suos*, because he has them only for his game and pleasure *ratione privilegii* whilst they are in his park, warren etc. But there are writs in the register (fol. 102), a book of the greatest authority, and several other places in that book which show that this rule is not always adhered to. The writ in folio 102 is' *quare clausum ipsius et intravit et cuniculos suos cepit*.

The reason given for the opinion in the books why they are not distrainable is that a man can have no valuable property in them, etc.

Then comes the real ground of the decision, the second paragraph at the top of page 128 :

And that this is the case of the deer which are distrained in this present case is admitted in the pleadings. The plaintiff by bring an action of trespass for them in some measure admits himself to have a property in them ; and they are laid to be *inclusas et coarctatas* in his close,

"They are laid to be", means "alleged to be"—

which at least gave him a property *ratione loci*; and they are laid to be taken and distrained there; but what follows makes it still stronger, for in the demise set forth in the plea and on which the question depends, they are several times called the deer of John Davies, the plaintiff.

. . . The plaintiff therefore in this case is estopped to say either that he had no property in them or that his property was of no value.

The case is a case decided on demurer and it is only of interest technically. It decides nothing. It simply says —

You as plaintiff have alleged they were your property. If they were your property, they were distrainable. The Court therefore say it is a good plea, and it is a good answer to your claim.

I have come to the end of all the authorities cited on the question of property, with one exception, and that is an additional authority cited by my learned friend Mr Phelps at page 180 of the printed argument. That is the only case which he adds to the authorities cited by my friend Mr Carter, the case of *Hannam v. Mocket*. This is a case of rooks. I have got the report here for the use of my learned friends if they desire it, or for any member of the Court; but there is quite enough in this for me to refer to.

The facts there are these:

The declaration [that is to say the plaintiff's claim] stated that the plaintiff was possessed of a close of land with trees growing thereon, to which rooks had been used to resort and to settle and to build nests and rear their young in the trees. That is to say, they came there year after year to this same place; by reason whereof plaintiff had been used to kill and take the rooks and the young thereof, and great profit and advantage had accrued to him, yet that the defendant wrongfully and maliciously intending to injure the plaintiff and alarm and drive away the rooks and cause them to forsake the trees of the plaintiff, wrongfully and injuriously caused guns loaded with gun-powder to be discharged near the plaintiff's close, and thereby drove away the rooks; and thereby the plaintiff was prevented from killing and taking the young thereof.

I need not say that rook-pie is supposed to be an edible commodity; and the shooting of young rooks sometimes amuses youthful sportsmen at all events.

Plea not guilty.

The general issue, in fact.

“Plea not guilty” means I deny what you say; I did not do the thing. The Case is tried; decided in a particular way; and then after trial, motion in arrest of judgment: it was held that this action was not maintainable, inasmuch as rooks were a species of bird *feræ naturæ*, destructive in their habits, not known as an article of food, or alleged to be so, not protected by any Act of Parliament; and the plaintiff could not have any right in them or show any right to have them resort to his trees. I should like to read what Mr Justice Bayley says in giving judgment:

A man's rights are the rights of personal security, personal liberty, and private property. Private property is either property in possession, property in action, or property that an individual has a special right to acquire. The injury in this case does not affect to be right of personal security or personal liberty, nor any property in possession or in action; and the question then is whether there is any injury to any property the plaintiff had a special right to acquire. A man in trade has a right in his fair chances of profit and he gives up capital to obtain it. It is for the good of the public that he should. But has it ever been held that a man has a right in the chance of obtaining animals *feræ naturæ* where he has had no expense in inducing them to his premises, and where it may be at least questionable whether they will be of any service to him, and whether indeed they will not be a

nuisance to the neighbourhood. This is not a claim *propter impotentiam* because they are young, *propter solum* because they are on the plaintiff's land, or *propter industriam* because plaintiff has brought them to the place or reclaimed them, but *propter usum et consuetudinem* of the birds.

In other words, the migratory habits, the *animus revertendi*, of the birds.

They of their own choice and without any expenditure or trouble on his part have a predilection for his trees and are disposed to resort to them.

The seals have a predilection for the Pribilof Islands and have a right to resort to them.

But has he a legal right to insist that they shall be permitted to do so? Allow the right as to these birds and how can it be denied as to all others.

Then he proceeds to point out the distinction in a claim of this kind between birds that are fitted for food and birds that are not fitted for food. He says :

It is not alleged in this declaration that these rooks were not fit for food; but we know in fact that they are not generally so used, etc.

Then follows a passage which is omitted in the Argument, but which is not unimportant. It follows after the word "established". He says :

So far from being protected by law they have been looked upon by the Legislature as destructive in their nature and as nuisances to the neighbourhood where they are.

Then follows the passage which is omitted.

It has been said that a man may acquire rights over other animals *similis naturæ* as affording him diversion, such as rabbits in a warren, doves in a dove-cote. But first it is to be observed that rabbits and pigeons are not only subjects of diversion but constitute an article of food. In the second Inst. 499, it is said that the common law gave no way to matters of pleasure (wherein most men do exceed) for that they brought no profit to the commonwealth; and therefore it is not lawful for any man to erect a park, chace, or warren, without a license under the great seal of the King... And even with respect to animals *feræ naturæ*, though they may be fit for food, such as rabbits, a man has no right of property in them.

Then he goes on to explain, in the way so many other authorities have done, what are the rights in respect to animals *feræ naturæ, ratione soli*, etc.

I have exhausted the authorities, I have considered every authority that has been cited by my learned friend on this point; and I am not justified in doing more than submitting to the Tribunal at this stage of the argument that there is not one of them which is not in favor of the propositions for which we are contending, the non-existence of property in the particular animal with which we are dealing in this case.

The Tribunal here adjourned for a short time.

The President. — Sir Charles, we are ready to hear you,

Sir Charles Russell. — My friend Mr Phelps has courteously intimated to me that his impression is that in that case of *Goff v. Kilts* (which is at page 117 of the printed Argument of the United States), the learned Judge did affirm the proposition that when bees take up their abode

in a tree they belong to the owner of the soil, if they are unreclaimed. I respectfully differ from my friend. What I first read is the head note of the case — not the reported words of the Judge. The head note ends with the word “ trespass ”; but if, Mr President, you will turn to page 118 of the printed Argument (which is the only foundation for that note in the judgment), I think it will be seen that it does not rightly construe what the learned Judge said. It is the sentence beginning :

It is said the *owner of the soil* is entitled to the tree and all within it. This may be true, so far as respects on unreclaimed swarm. While it remains there in that condition, it may, like birds or other game, (game laws out of the question) belong to the owner or occupant of the forest *ratione soli*. According to the law of nature, where prior occupancy alone gave right, the individual who first hived the swarm would be entitled to the property in it; but since the institution of civil society, and the regulation of the right of property by its positive laws, the forest as well as the cultivated field, belong exclusively to the owner, who has acquired a title to it under those laws. The natural right to the enjoyment of the sport of hunting and fowling, wherever animals *feræ naturæ* could be found, has given way, in the progress of society, to the establishment of rights of property better defined and of a more durable character. Hence no one has a right to invade the enclosure of another for this purpose. He would be a trespasser; and, as such, liable for the game taken. An exception may exist in the case of noxious animals, destructive in their nature. Mr Justice Blackstone says : — If a man starts game in another’s private grounds, and kills it there, the property belongs to him in whose ground it is killed, because it was started there, the property arising *ratione soli*. (2. Black Com., 419). But if animals *feræ naturæ* that have been *reclaimed*, and a qualified property obtained in them, escape into the private grounds of another in a way that does not restore them to their natural condition, a different rule obviously applies. They are then not exposed to become the property of the first occupant. The right of the owner continues —

and so on.

I submit it is clear that the learned Judge there is referring to the argument in the course of the case, in which he says.

It is said the *owner of the soil* is entitled to the tree and all within it. This may be true. —

He is treating it as a point made in argument; but he goes on to show, in the very next words, that he is there referring not to the question of property strictly so called, but to the right of the owner *ratione soli*, that exclusive right to take, and there being no property without taking. As my friend was good enough to call my attention to it, I thought it right to make that observation.

Now, I have exhausted all the authorities cited by my learned friends in the course of their written Argument, and there were none others referred to in the course of the oral argument; but my friend Mr Carter has been good enough to furnish us with a small volume,—I do not know whether the members of the Tribunal have had it or not,—it is entitled, “ Citations from the Writings of Jurists and Economists illustrating and supporting certain propositions maintained in the Argument of the United States upon the subject of property ”. Well, I wish to pay every tribute to the erudition and labour of my friend; but when I cite the

propositions in respect to which these authorities are collected together, unless I am invited to do it by the Court, I certainly do not intend to pursue the enquiry further.

Now, the propositions are these.

FIRST. That the earth and all its bounties were originally bestowed upon mankind in common.

SECOND. That the institution of *property*, and especially of *private property* exists only for the satisfaction of the great social necessities of mankind.

That such necessities may be generally described as two-fold :

1. The preservation of peace and order.

2. The *preservation* of the gifts of nature, and the making of them *more productive*, in order to support the increasing population of the earth which the advance of civilization necessarily involves.

THIRD. That the institution of property is governed by the *social necessities* which it is designed to satisfy; and will be extended to every subject to which those necessities require its extension.

FOURTH. That the extent of the dominion which is allowed by the institution of property, either to nations or to individuals, is always limited by the social duties which invariably accompany it.

1. It is the *use* only which is given.

2. They must be so used as to carry out the purpose of the original gift for the benefit of all mankind. What is not needed for the use of the nation or individual owning the gift must be offered on reasonable terms to the rest of mankind.

3. Nothing must be wantonly or needlessly destroyed.

FIFTH. Wherever a useful thing is not furnished by nature in quantities sufficient to satisfy the desires of *all*, and will be exhausted unless it may be preserved by making it the subject of property, it must be made the subject of property.

I really do, with the greatest deference to my friend, and not, I hope, using more vehemence of language, or pointedness of language than the occasion requires, say that this is an invitation to us very far afield from the question that you have to decide. You are not here framing laws; you are not here judges of ethics or of morals; you are here to declare what the law is; and you are not even to trouble to enquire into the foundation upon which the law rests, but you are to declare it as you believe it to be.

Now I have to supplement these authorities by certain authorities referred to in our Argument and Counter-Case. In the British Counter-

Case, page 82, a number of authorities are cited, with which I do not intend to trouble you; but there is, on page 83, one authority I should like to cite because it is an American authority — the opinion of a writer of distinction — I mean Chancellor Kent. On page 83 there will be seen a citation from the Boston edition, the 9th edition of his Commentaries, page 1858, vol. II, p. 432 :

Animals *feræ naturæ*, so long as they are reclaimed by the art and power of man, are also the subject of a qualified property; but when they are abandoned, or escape, and return to their natural liberty and ferocity, without the *animus reverendi*, the property in them ceases. While this qualified property continues, it is as much under protection of law as any other property, and every invasion of it is redressed in the same manner.

The difficulty in ascertaining with precision the application of the law arises

Additional authorities
cited by Great Bri-
tain.

from the want of some certain determinate standard or rule, by which to determine when an animal is *feræ vel domitæ naturæ*.

If an animal belongs to the class of tame animals, as, for instance, to the class of horses, sheep, or cattle, he is then clearly a subject of absolute property; but if he belongs to the class of animals which are wild by nature, and owe all their temporary docility to the discipline of man, such as deer, fish, and several kinds of fowl, then the animal is the subject of qualified property, and which continues so long only as the tameness and dominion remain.

Then at the bottom of that page in our Counter-Case, the argument which is at the basis of our case on property is suggested, thus :

It would seem useless to multiply authorities, as there is no suggestion throughout the United States Case that, even in their own law, the rule is not as laid down by Kent.

Then there follows a statement which I think is not immaterial, especially in view of some observations made by Senator Morgan, but which I merely intend to refer to and not to dwell upon : it is pointed out that the effect of the law of the United States, beginning with the law of 3rd March 1869, by which the Islands of St. Paul and St. George were declared to be a special reservation for Government, is not an affirmation of any property in the fur-seals; and it is further pointed out, on page 84, that when the lessees assumed that position from the United States, all that was given to them by their lease was “ the exclusive right to engage in the business of taking fur-seals on the Islands of St. Paul and St. George in the territory of Alaska. ” I do not, however, in this connection pursue this subject.

Now some further authorities are referred to, in the printed Argument of Great Britain; but inasmuch as all the authorities have been discussed by me at length, I do not think it necessary to do more than ask the Tribunal to bear in mind that there is that reference to further authorities at that place, and that there will be found what we submit is an accurate statement of the law, both as to that prevailing in the United States, and that prevailing in Great Britain.

On page 31 of the English Argument you will find this :

The common law in force both in America and England as to animals *feræ naturæ* is identical.

This law recognizes no property in animals *feræ naturæ* until possession. Property, while the animals are alive, remains only so long as this possession lasts; when this possession is lost the property is lost. The law considers that they are then wild animals at large, and that the rights of capture revert to all alike.

The owner of land has what is sometimes called a qualified property in wild animals on the land, but this is no more than the exclusive right to take possession while they are there, and when they leave the land that exclusive right is gone.

There is one other American authority to be cited. I have already referred to him, but for another purpose — I mean Professor Angell — (I refer now to page 93 of the first volume of the Appendix to the Case of Great

Britain). — In his article in the “ Forum ”, he states the argument of the United States as plausibly as it can be put. He says :

It may be argued that, since most of the seals which are taken by the British breed on our soil in the Pribylof Islands, we have an exclusive claim to them in the sea, or at any rate a right to protect them there from extinction. But some of them breed on Copper Island and Behring Island, both of which belong to Russia. How is it possible to maintain any claim to ownership in seals on the high seas under any principle of law applicable to wild animals? We can acquire no property rights in animals *feræ naturæ* from their birth on our soil, except for the time that we hold them in our possession. A claim by Canada to the wild ducks hatched in her territory, after the birds have passed her boundary, would seem to be just as valid as ours to seals in the open sea.

Then a little lower down he says :

On the whole, we find no good ground on which we can claim as a right the exclusion of foreigners from the open waters of Behring Sea for the purpose of protecting the seals.

Now I intend to supplement the authorities already referred to by only one or two more. I refer to the case of *Gillet V. Mason*, which is a United States case, decided in 1810, and reported in the 7th Volume of Johnson's Reports. It is on the question of bees. I cite it merely to shew that the law of the United States, as regards bees, is the same as the law of Great Britain; and, indeed, that the judgment was based upon the citation, to which reference has already been made, from Blackstone.

Now the head note in that case is this :

Bees are feræ naturæ; and until hived and reclaimed, no property can be acquired in them. Finding a tree on the land of another, containing a swarm of bees, and marking the tree with the initials of the finder's name, is not reclaiming the bees, nor does it vest in the finder any exclusive right of property in them; nor can the finder maintain trespass against a person for cutting down the tree and carrying away the bees.

In giving his judgment the learned Judge cites the opinion of Blackstone (2 Commentaries p. 392), and of Justinian, as the justification for the legal view that he takes as to property in bees.

Then, again, as regards rabbits, I refer to the case known as *Boulston's Case*, which is in the 5th volume of Coke's Reports, page 512 :

Between Boulston and Hardy it was adjudged in the Common Pleas that if a man makes coney-boroughs in his own land, which increase in so great number that they destroy his neighbour's land next adjoining, his neighbours cannot have an action on the case against him who makes the said coney-boroughs; for so soon as the coneys come on his neighbour's land he may kill them, for they are *feræ naturæ*, and he who makes the coney-boroughs has no property in them, and he shall not be punished for the damage which the coneys do in which he has no property, and which the other may lawfully kill.

In other words, if he had the property in them, and kept them on his land, he would be responsible for the damage that they did; but being no man's property — being the property of the first man who kills them — and the owner having the exclusive right to kill them while on his land and no more, he is not liable for the damage that they did.

The last case I intend to cite is an interesting case, which perhaps, in this very dreary and dry subject is something to say for it. It is the case of *Ibbotson v. Peak*, which is reported in the 34th volume of the Law Journal Reports, New Series, page 118. It was decided in 1865. The action was a very curious one : the facts were these. There were two adjoining owners. One was the Duke of Rutland, who had upon his land grouse preserves, which he took great pains (to use an expression used by my friends in their argument), to “cherish”. Adjoining him, was a neighbour who was not unwilling to get some benefit from the fact of his contiguity to these same preserves, and who had resorted to the most unsportsmanlike and unneighbourly means of enticing the birds to leave the Duke of Rutland’s preserves and come upon his ground; and he had done that by seeking to decoy them by putting down food in particular places contiguous to the Duke’s preserves, with the result that he did induce a considerable number of the grouse to come to him.

Thereupon the gamekeeper of the Duke, not to be out-done, thought he would endeavour to deprive the unneighbourly neighbour of the advantage, and he proceeded to fire off, in the neighbourhood where this provender was put as an inducement to the grouse, guns, rockets, fireworks, and things of that kind to drive them away from the lands to which they had been so enticed, and back again to their usual ground on the Duke’s preserves.

Thereupon the neighbour brought an action against the Duke’s representative for injuring him by these means. The Duke in answer said, “As to so much of the plaintiff’s case as alleges” — so and so —

the defendant says that before the time of the committing of the said supposed grievances in the first count mentioned, his Grace the Duke of Rutland was seised in fee of certain land abutting on and next adjoining the land of the plaintiff in the first count mentioned, and was entitled to the exclusive right of shooting, killing and taking grouse on his land; and the said Duke, before the committing of the said supposed grievances, had gone to great expense in getting up and preserving great numbers of grouse on his lands, as the plaintiff well knew; and the defendant says that just before the committing of the said supposed grievances the plaintiff fraudulently and wrongfully, and with intent to lure and entice the said grouse away from the said lands of the said Duke on to the lands of the plaintiff, and to obtain for himself the benefit of the expense so incurred by the said Duke as aforesaid, laid and placed on the land of the plaintiff near to the lands of the said Duke, quantities of corn and other substances on which grouse feed, and thereby then lured and enticed the said grouse.

Thereupon he goes on to say that all he did by his fire-works was to get them away from the spot to which they had been enticed. The question was, Did an action lie? Held that an action, even in that case, lay against him. The Duke had no property in the grouse. They were only his so long as they were on his land, and he had the right to take them while on his land, and no more than a right to take them when they were on his land. And Lord Bramwell who interposed in the

beginning of the argument of the case, illustrates his view of the matter by saying.

In *Chasemore v. Richards* the plaintiff was possessed of a spring underground which supplied his well. The defendant dug a well on his land, and the plaintiff's spring in consequence dried up. The only remedy the plaintiff had was to dig his well deeper and so retain the water if he could.

So, says Lord Bramwell, in the present case the remedy of the Duke is to offer greater attractions to the grouse, and induce them to come in that way, and because the plaintiff has done an unneighborly thing, he has got no right to frighten them away.

He says :

What is the reason given? The reason given is this : That the game which the defendant frightened away was game which the plaintiff wholly or partially got from off the Duke of Rutland's land, — say the Defendant's land — the Duke having attracted it there by providing food for it, or taking care of it, and then the plaintiff improperly attempted to get it on his land by putting down some grain on his land. Then, in order that the plaintiff may not shoot the game which the Plaintiff had so attracted and in order that the plaintiff may have no inducement to go on with such conduct — for that is the only meaning of preventing him from alluring the grouse aforesaid, — in order that he should be without inducement for such acts as that, the defendant did the thing complained of. It appears to me clearly that the plea is bad, because I see nothing in point of law, to prevent the plaintiff from doing that which the plea alleges he has done. If the plaintiff has done no wrong, how can there be a justification of the defendant's act. No one can pretend for a moment that any action would lie at the suit of the Duke against the plaintiff. The truth is this : without saying anything as to the propriety of such conduct as this between gentlemen and neighbours, the true remedy, I take it, where a person knows game is attracted away from his land, is to offer them stronger inducements to remain.

Now I have said that we have exhaustingly and exhaustively stated the municipal law of these two great communities, but I have yet to trouble the Tribunal with the law of another great community.

French law as to
wild animals.

I mean the law of France; and at some trouble, and with some pains, we have endeavored to inform ourselves about this law ; and it will be found that, with very slight exceptions, it is essentially the same in principle as that of the United States of America and of Great Britain.

I am glad to know that there is, in the President of this Tribunal, one who can check or correct, if any error be committed, our statement of the French law. I find as the result of this enquiry that there are recognized three main divisions of living animals ; wild animals : *Fera*, who live in a state of natural freedom, or as the civilian expresses it *in laxitate naturali*. I find that there are domestic animals, *Mansueta* ; and the third class is the half-tame or reclaimed animals, *Mansuefacta*, which is an intermediate class between the other two. But I find also that the existence of that third class is not admitted universally by text writers ; but it is to be added that the existence of that class is a matter of small importance, for these animals are regarded by the law in the light of domestic animals when they are on the land, that is to say, the right to take them

is recognized when they are on the land; and treated as wild, or no man's property, when they are off the land.

Senator Morgan. — Does the Government of France assert a title in any wild animals for any purpose?

Sir Charles Russell. — I am not aware, except on the same lines I have been endeavouring to explain; but I would respectfully refer to the President as a much more reliable authority.

Now as regards domestic animals, or the animals which belong to the first class, they are dealt with by various articles of the Code; and I do not think I need trouble the Tribunal at all to refer to that. As regards wild animals, I will give a definite reference to authorities. A wild animal in a natural state of freedom belongs to no one. It is *res nullius*; the method of acquiring a right of property over it is by taking possession; and the reference to that is Aubry and Rau, *Droit Civil*, Vol. 2, paragraph 201.

The President. — That is the acknowledged principle of our French law.

Sir Charles Russell. — Yes. The things which are recognized by French law as *res nullius* include these categories: Things which can never be the private property of any one: Things such as air, light, the high sea, and so on: Things which do not actually belong to anyone, but which, by their nature, become the object of a personal appropriation by possession. Such are wild animals, fish of the sea, and so forth. As regards the products of the sea, such as amber, coral, and so on, a distinction might be made, which is a distinction made in Italian law also: If the things are taken from the bottom of the sea or caught upon the waves, they are the property of the first taker. If, on the other hand, they are simply found on the sands, a part belongs to the finder and a part to the State. And the authority for that is Busson, « Des Établissements de Pêche », page 17.

The President. — The State is the legal owner of the shore, but a part of the find belongs to the finder as the general rule. The shore of the sea is considered as belonging to the State as it would to any private man.

Sir Charles Russell. — Quite so, but as to the sea, everyone has an equal right to gather the riches which it contains, for these riches, up to the time of their being taken possession of by the individual are common to all; for which the authority is also Busson, « Des Etablissements de Pêche ». Then I need not refer to an account which is interesting, but not directly *ad rem*, as to restrictions which in former times existed upon the pursuit of hunting and the way in which those rights were exercised.

The President. — Perhaps you would kindly give us the authorities about it.

Sir Charles Russell. — Certainly I will read the whole authority. Hunting, says in effect the Court of Cassation, includes the whole series of operations which begin with the search for any wild animal for the purpose of ultimately effecting its capture. Hunting being the means of capturing and appropriating to oneself wild animals, it follows that hunting

is only the exercise of a natural right. Nevertheless this natural right has been for a long time appropriated in France by the feudal law to the profit of the Sovereign.

It was considered as a royal right. The Nobles alone had the power to hunt, but they did not exercise it even on their own lands except by royal licence.

Then a reference is made to the royal Ordinance of Louis XIV in which Articles XIV and XXVIII are as follows :

We permit all Lords, Gentlemen, and Nobles to hunt in noble fashion with dogs and birds in their forests, thickets, warrens, and plains, provided that they keep a league distance from our plesaunces for buck and *bêtes noires* to a distance of 3 leagues.

Then Article XXVIII is :

We prohibit Merchants, Artizans, Commoners, and Inhabitants of towns, boroughs, parishes, villages, hamlets, peasants and yeomen of whatever condition and quality they may be, not possessing fiefs, lordships, and *haute justice* from hunting in any place, condition or manner, or any furred or feathered game whatever under penalty of 100*l*, fine for the first time, double for the second, and for the third, to be liable to three hours in the pillory of their place of residence on market day, and banished for three years from the jurisdiction of the *maitrise*, unless for some cause the judges can remit or diminish the penalty to prohibition.

The President. — The right of hunting was considered a regal right, and the Lords had it by tenure only as a derivative right.

Sir Charles Russell. — Yes, as a seignorial right.

The President. — As a seignorial right; and that was all derived from the sovereign right.

Sir Charles Russell. — Quite so.

Senator Morgan. — If I understood it, Mr President, you said it was a right derived from the Sovereign, and not inherent in the individual?

The President. — It was not inherent in the individual under our ancient law.

Sir Charles Russell. — Quite so. It was the old feudal law, in which the King was supposed to be the source and origin, the head of the whole society, — the Lord of all that was possessed, who granted out from his royal favour this, or that, or the other. That was the old original feudal idea, undoubtedly.

The President. — It was somewhat different from the right of property. The right of property was quite independent of any grant of the King. Feudal right was derivative, but allodial right was not derivative, — the right of hunting was considered part of the power, and it was given in fee, just as the right of justice was given. You know that landlords were judges, and were entrusted with the care of judging in certain provinces and at certain times. They had the right of “mint”, and several other regal rights of that sort. The right of hunting was a derivative right from the sovereign power. It was not quite the same as property.

Sir Charles Russell. — Then there is a reference to the existing Police Law of 1844, which I do not think I need trouble about. It simply says that no one shall have the right to hunt on the property of another without the consent of the proprietor or of his assigns. The right of hunting is thus accessory to property; but it must not be confounded with right over the game. The right of the chase only allows the proprietor to legally possess himself of wild animals found on his land, and so forth.

Then Monsieur Demolombe, in commenting on the general provisions of Book 3 of the Civil Code, — this is in his « *Traité des Successions* », Volume I, sections 26 and 27 — as to the different methods in which a man acquires property, puts the question, does the hunter who kills a head of game become the owner of it? This is our subject. The answer is simply, the property in the animal killed in hunting belongs to the hunter in virtue of the right of possession. This is one of the divergences from English Law, because this is not restricted to hunting upon his own land. It agrees there with the Roman Law.

This rule is perfectly clear when the animal has been killed by the hunter on his own land, or on the land of another with the permission of the proprietor. But ought this rule to be applied in the case where the hunter has killed or taken the game on the land of another without the permission of the proprietor, or in spite of his prohibition? This is a very old question, and Cujas has maintained the negative. But the contrary solution has always been generally insisted upon; and it is that which follows from the Roman Laws.

So that he adopts that view.

Then he goes on :

Pothier in our ancient law likewise maintained it (de la Propriété n° 24), and it is without any doubt the best according to our present law. The prohibition by the proprietor against any person hunting on his land does not really change the nature of the game which is none the less always a thing *nullius*; ‘*prohibitio ista*’ as Vinnius well says ‘*conditionem animalis mutare non potest*’. The owner of the land cannot bring an action to recover the game since he has never been the owner of it; all he can do is to sue for damages.

That is for the trespass. Then the Law of the 3rd of May 1844, which I have already referred to, contains nothing contrary to this principle; but it does appear to provide that in the case of hunting during the prohibited time this law deprives the hunter of the game which he has killed or taken; and, further, in reference to killing out of season, it is not in order to restore it to the proprietor of the land on which it has been killed by a third person, for, as we have seen, the law gives it on the contrary to charitable societies.

Senator Morgan. — Confiscates it.

Sir Charles Russell. — Yes, if it can be called confiscation.

Senator Morgan. — That is because it is killed in violation of law.

Sir Charles Russell. — Then the next passage which is instructive is from the book by M. Villequez, doyen de la Faculté de Droit de Dijon, « *Droit du chasseur.* »

Game at large which is not confined in an inclosed area from which it cannot escape, belongs to no one, no more to the proprietor of the land on which it is harbouring, lying or perching or through which it is passing than to any one else. It becomes the property of the first who takes possession of it even on ground where he has not the right of chase or pursuit. This is a constant principle applied without dispute from the time of the Romans to our own days. It results from the very nature of the things. Natural law and reason alone would teach it, were it not everywhere written and acknowledged. A right in fact is not intelligible except so far as it is possible to exercise it. The exercise of the right of property consists in the use of the thing which is subject to it. The proprietor of a field uses it when he cultivates it, when he reaps it, or even when he walks over it. To use a hare which is lying there he must begin by taking it, or at least by having it in his possession in such a manner as to be its master and to prevent it from escaping. Up till that time it belongs to no one, is its own master, and often will only lose its liberty with its life, to the profit of whoever kills it for the purpose of appropriating it by taking possession.

The next clause is from Pothier *De la Propriété*, No. 57, and from the same author Demolombe, vol. xiii, No 26.

The property which is established in wild animals by possession rests so clearly on the fact of effective possession that it is lost with that possession when the animals by escaping from us have regained their natural liberty, and have thus returned to the "negative domain" of the human race; thus differing from inanimate things and domestic animals in which we retain the property even when they are lost.

Then, upon the subject of fishing, fish of the sea and in running waters are also, as we have said, like wild animals, *res nullius*. The capture of fish is effected by means of a series of operations covered by the description of fishing. And then from the *Ordonnance sur la marine* of 1681, 5th book, title I, article 2, and also from Pothier's *De la Propriété*, No 51, everyone can fish in the sea without permission. It is, in this sense, that one is accustomed to say sea-fishing is free; for, in other respects, it is subject to by-laws and police rules, which in the general interest, in order to prevent the destruction of the spawn and to encourage the reproduction of different kinds of fish, determine the seasons and hours during which fishing is forbidden, the method, the machines and instruments prohibited, and the size of the nets which may be used. These rules are not binding in the open sea except on the nationals whom alone the national law can follow outside their territory (Civil Code, article 3). They have no legal effect as regards foreigners, except in the limits of the territorial sea.

Then I could refer if need be, and I must refer to it in another connection, though I may mention it here as it is under my eye at this moment, to cases which are constantly occurring, where the interests of countries separated by water or contiguous by land are concerned: thus boundary questions have arisen between France and England as to fisheries, where France has seen the utility of admitting certain limitations and certain rights claimed by Great Britain, and Great Britain, on the other hand, has seen the equity and utility of conceding to France, and Belgium and other Powers, the same limitations, — I must say something on

this at some later period, probably at greater length; but all this goes to show that these Conventions or Agreements for mutual accommodation are effecting that which international law cannot effect, because it does not provide for it. They are outside the domain of that law; they are dealt with upon principles of mutual give and take and mutual convenience; and even in these cases, I need not say, the Conventions so made and the legislation of the respective countries intending to give effect to these Conventions only bind the respective nationals, and bind no outside Powers and the nationals of no outside Power whatever, and, therefore, it does not fall within the scope of international law.

Now I will only make one further reference, and that is to say that the law as to bees is the same as that which I have been already dealing with and there is a case decided by the Cour d'Appel de Toulouse as late as May 1876, where the principles are laid down by that Court in strict conformity with the authorities which I have already been citing :

When bees are in a wild state, they are *res nullius* and become the property of the first taker. If they have taken up their abode in the hives they are susceptible of private property. The recent law of the 4th April 1889 of the Rural Code in Article 7 indicates in what manner the property in bees ceases when the bees located on any land abandon it.

These are the words of the law of 1889 :

The proprietor of a swarm has the right to retake it, and repossess himself of it as long as he has not given up its pursuit; otherwise the swarm belongs to the proprietor of the ground upon which it has settled.

He has the right to take it.

Senator Morgan. — Is that a Statute?

Sir Charles Russell. — Yes, the Rural Code of 1889.

Lord Hannen. — There have been some decisions on that.

Sir Charles Russell. — This decision could not have been on that; but it was on a similar law. This is in 1889, and it conforms to the previous decision of the Cour d'Appel de Toulouse, delivered in 1876.

Lord Hannen. — There is a case somewhere with reference to silkworms. Have you got that?

Sir Charles Russell. — No, I have not got that case. The reasons given in the Cour d'Appel de Toulouse I might read.

Considering that according to the tests furnished both by principles and by jurisprudence, domestic animals are those which associate with man, live about him in his house, are nourished and bred by his care; that the bees still retain, after being taken possession of by man, their wild nature which the Roman law recognized; that they do not live near man and under his roof, and they are separated from his habitation by reason of the inconvenience and danger which their proximity involves; that the bees familiarize themselves so little with man that one is obliged to take precautions in approaching their hives and removing their honey, which the labour of these insects has stored in cells;

Considering further that if in a certain measure the surveillance and care of the proprietor is employed in the preservation and nourishment of the bees, that they rely for their subsistence in taking from shrubs and flowers near the hives, and in carrying thither the substances that they have gathered.

Considering also that these essential difficulties make it impossible to class bees in the category of domestic animals.

That is the short decision.

Senator Morgan. — Was that before the statute to which you referred ?

Sir Charles Russell. — Yes I have said so. The decision was in 1876 and the Statute was passed in 1889.

Lord Hannen. — It was a codification of the principles embodied in that decision.

Sir Charles Russell. — Yes.

There is another decision also referred to of the Cour de Limoges to the same effect.

Mr Phelps. — These have not been quoted in your previous argument, and we have had no access to them or opportunity to see them.

Sir Charles Russell. — I do not wish to say anything that would be at all irritating, but it is to be borne in mind that my learned friend Mr Carter very early before commencing his argument deplored the loss of certain French authorities which he hoped to be able to recover or replace, and therefore my learned friend's mind, which was no doubt laboriously engaged in this matter, was addressed to the subject of French authorities, and indeed it was that which suggested to us that we should explore the same region with the result that I have put before the Court.

The President. — It is an argument of analogy.

Sir Charles Russell. — Yes : I claim to have shown that the laws of France, the United States, and Great Britain, all concur; and so far as I know, but it is not safe to generalize, the municipal law of no country can be invoked in favour of the claim to property in the seals; and thus municipal law cannot be invoked in favour of this claim of the United States to property. Now I have dealt with the general propositions.

The President. — May I remind you with regard to what you said as to the Russian law, that the Russian law did not admit of *res nullius*.

Sir Charles Russell. — I did say so.

The President. — Yes.

Sir Charles Russell. — I do not think that contravenes the proposition I am now upon.

The President. — I merely remind you of what you have stated — the seal in Russia would not be *res nullius*.

Sir Charles Russell. — The law would not give it to the proprietor of the land on which it was found. If it did not belong to the proprietor, it would belong to the State. I suppose that is the result of the Russian law.

The President. — What you stated this morning was quite novel to me, and I cannot form an opinion from a law I do not know.

Sir Charles Russell. — I have seen it somewhere stated. I know that Russian law does form an exception to the general law of other

countries in that regard, that nothing is said to be according to the Russian law without an owner, and if there is no private owner the State claims to be the owner. I thought it right to say that, because I had seen it, but the authority for it I do not recall.

The President. — It may be said that is one of the objects that are capable of appropriation.

Sir Charles Russell. — Yes, matters which are capable of being the subjects of property; and, as regards animals *feræ naturæ*, there is merely that right to take them and so acquire the property, and nothing more, — it may be so.

The President. — The fact is, we do not, either of us, know the law.

Sir Charles Russell. — No; I do not trust myself to speak positively about it.

I am not at all sure, Sir, that it would not be a more correct thing to say of wild animals that they are *res communes* rather than *res nullius*. That may possibly be. I merely suggest it because anybody may take them. I should not like to pledge myself to any view about it.

Senator Morgan. — They are *res*, at any rate.

Sir Charles Russell. — They are *res*, certainly.

THE APPEAL TO INTERNATIONAL LAW

But now, Mr President, I have yet to deal with another view of this question, what law is to govern this Tribunal in determining this question. I submit that I have demonstrated that municipal law does not support this claim, but negatives it. I have further submitted that title in things must take its root in municipal law, and I have sought to illustrate that by pointing out to you what the case must be if, instead of the Pribilof Islands being the national property of the United States, they were, as they well might be, the private property of an ordinary individual. I gave as an illustration yesterday the Scilly Islands on the southwest coast of England, and many other islands along the coast. Suppose that, in such a case, the private owner of those islands asserts that his right of property in the seals is attacked by pelagic sealing in the adjoining ocean.

What must be his initial step? He is complaining of an invasion of his right of property in the fur-seals, by a neighbour, by a pelagic sealer from the adjoining coast. He sues him in trespass; he sues him in trover; he sues him in any form of action he chooses. The first step he must take, the first position he must lay down clearly and distinctly, is that according to the law of the place he has a title to the thing which he claims, and his right to which he says has been invaded. Can there be any difference — is there any ground conceivable for treating the question in a different way, because the United States happen to be the owners of the sovereignty over the Islands and have given to their lessees the right

to take these seals on the Islands? Is the question any different because the claimant here is the United States, from what it would be if the lessees were the claimants : or if a private person, being the owner of the Islands, was the claimant? I say it is impossible that property should exist in one case, and not exist in the other, or that property should be non-existent in one case if it is not also non-existent in the other.

But then my learned friend says in effect : — Failing municipal law, deriving no authority from municipal law for my position, yet there is another law which gives me property, which gives me the right I claim, and which is the law in this matter to determine the right of these parties, and that is international law.

Let us see if my friend is well founded there. What must he do ; must he not in order to derive support from international law establish — for the *onus* is upon him — that international law has laid down a rule or a principle treating fur-seals in a way different from the mode in which municipal law regards them, as animals *feræ naturæ*? or in other words, must he not support the proposition that, while by international law, all nations on the high sea are equal and have a right to take from the sea what they can get from the sea, that international law has engrafted upon that general principle an exception which excludes fur-seals or any similar creature from that generally admitted right?

Surely I am right in affirming that one or both of those propositions must be established by my learned friend. Has he made an attempt to support either of them by reference to international law ? I submit he has not ; and here again I must recur to what I think must be from time to time, if I may say it with respect, borne in mind by the Tribunal as to what international law really is. I have already endeavoured to explain that nothing can be considered international law as to which it cannot affirmatively be shown that the consent of civilized nations has been given ; and that nothing short of an affirmative answer to the question *placuitne gentibus*, applied to any proposition, will satisfy the test of what international law is. My learned friend says international law, moral law, natural law, are all practically interchangeable words, meaning the same thing. I would like to examine this briefly for a moment or two.

It is quite true that there are some writers of distinction who refer to natural law as the basis and source of international law, and whose language would seem to show that they regarded natural law as the same thing. Puffendorf is the most prominent amongst these ; but such writers as Bynkershoek and Wolfe have an entirely different view. Heffter, with whom I have no doubt the President is entirely familiar, speaks of international law as founded on necessity developed by morals.

Calvo recognizes the idea of general justice as modifying for the common good the relations of States ; but he himself prefers to rest international law upon the principles defined by various Treaties, and rules, natural and logical, to be deduced from many ingredients in many cases,

carried into practice and generally recognized; he finally sums it up in the phrase “ *la jurisprudence consacré par la coutume.* ”

There are two very acute criticisms upon this subject to which I should like to draw the attention of the Tribunal. One is the criticism of Bentham, cited, and cited with approval, by Ortolan in his “ *La Diplomatie de la Mer* ”. I am citing from the second edition of 1853. He cites a passage from Bentham of a very incisive character, as nearly all of Bentham's were, in which he is speaking of natural law, and natural right as springing from natural law. He says :

Natural right is often employed in a sense opposed to law, as when it is said, for example, that law cannot be opposed to natural right, the word “ right ” is employed in a sense superior to law : a right is recognized which attacks law, upsets, and annuls it. In this sense which is antagonistic to law, the word “ *droit* ” is the greatest enemy of reason, and the most terrible destroyer of governments. We cannot reason with fanatics armed with a natural right, which each one understands as he pleases, applies as it suits him, of which he will yield nothing, withdraw nothing, which is inflexible at the same time that it is unintelligible, which is consecrated in his eyes like a dogma, and which he cannot discard without a cry. Instead of examining laws by their results, instead of judging them to be good or bad, they consider them with regard to their relation to this so called natural right. That is to say they substitute for the reason of experience all the chimeras of their own imagination.

Another critic, a very able and acute one, Austin, speaks to the same effect. I am now reading from a book which has certainly had enormous influence on the mind of England, and the value of which I think has been almost universally recognized. I mean his “ *Province of Jurisdiction Determined* ” : at volume I page 222, he says :

Grotius, Puffendorf and other writers on the so-called law of nations have fallen into a similar confusion of ideas.

What that confusion is you will find from the context.

They have confounded positive international morality, or the rules which actually obtain amongst civilized nations in their mutual intercourse, with their own vague conceptions of international morality as it ought to be, with that indeterminate something which they conceived it would be if it conformed to that indeterminate something which they called the law of nature. Prof. Von Martens of Gottingen who died only a few years ago is actually the first of the writers on the law of nations who has seized this distinction with a firm grasp, the first who has distinguished the rules which ought to be received in the intercourse of nations or which would be received if they conformed to an assumed standard of whatever kind, from those which *are* so received, endeavoured to collect from the practice of civilized communities what are the rules actually recognized and acted upon by them, and gave to these rules the name of positive international law.

Now, lastly, an American author, Mr Woolsey. This is in the original text. This is in fact the first edition. It is the introductory chapter, page 13 of the first edition. He says.

Thus Puffendorf commits the faults of failing to distinguish sufficiently between natural justice and the law of nations, of spinning the web of a system out of his own brain, as if he were the legislator of the world, and of neglecting to inform us what the world actually holds the law to be, by which nations regulate their course.

But now, apart from these weighty authorities, am I not justified in saying as to the natural law what I have already intimated in the previous part of my argument as to the moral law, that it is only so much of the rules of morals or the rules of the law of nature, as have received the *imprimatur* of nations — evidenced by the assent of nations expressed or implied — only so much as has been taken up by that consent into the body of international law is in truth international law.

I took occasion this morning to put to my learned friends the question argumentatively, and I now repeat it; can they refer to any controversy between nations which has ever been settled by a reference either to natural law direct, or to a supposed law of morals? I think they will find it difficult to find any such case.

But now I have to meet this suggestion of my learned friend, namely, that although he may be wrong in saying that natural and moral law are the same as international law, yet that although they may not *per se* be international law unless and until consent of civilized nations has been given, yet—and I think he put this affirmatively in his argument — yet that you are to presume that nations have assented as part of international law to all principles of morals, and all principles to be drawn from the law of nature, until you can show that they have dissented.

I first ask the question : Is there any authority for this statement that any such thing is to be presumed? I have already pointed out that, so far as the law of nature is concerned, it could give us no help whatever upon the question of property : for that the true view of all law, properly so called, municipal as well as international, is that it has substituted rules of right and equity for claims of property which originally, according to natural law, rested for their ultimate sanction upon force and upon force alone.

But, let me ask again, where are we to find these laws of nature? What nations have agreed upon them? Where are they codified? Where are they to be found? “What is the book, edition and page” to which reference has been made? No satisfactory answers can be given to these questions.

Again, what are the rules and laws of morality? Upon what points where they touch modern society, regarded either municipally or internationally, do societies of men, or do nations, agree as to them? Is it not true to say that opinion, which is matured upon a particular point touching morals in one nation, is in a state of flux and uncertainty in another nation, even upon points where there is a general consensus in reprobating a particular course of conduct? I gave an illustration the other day — and what other illustration can be stronger — the slave trade; yet it cannot be affirmed that the slave trade is yet relegated by international law to the same category as piracy, or carries with it the same sanction. Or, again, take the illustration which the argument of my learned friends here supplies. According to their contention, it is — and the United States have made it, as far as municipal law can make it, — a

crime against the law of nature or of morality, or of both, to kill a female seal. Is that a rule of morality which prevails the world over? Have nations agreed in regarding this as a crime? Has international law or a congress of international statesmen ever suggested that to kill a female of any species of animals, wild or domestic, aye, or even a gravid female — very reprehensible and regrettable, it may be — was to be regarded as an international crime?

I have said before that there are certain great principles of morals which have been used to test the relative value of conflicting usages or tendencies of opinion or doctrine, to give formal expression to growing custom, to support fresh theories placed before the world for consideration and acceptance; but no attempt can be made to directly impose such principles upon States as a direct obligation until the consensus of nations has first assimilated them as part of the international law.

If I am right in this—and I submit that I am—the conclusion is that it is not a question of presuming assent to ideas of international law, or morality, or anything else, as to which civilized nations, just as civilized men, take different, diverging views; but that to constitute international law, assent has to be affirmatively shown.

Finally, in this connection, I have to submit that modern international law has long passed the stage at which an appeal to any vague, general principles can afford any safe, certain resting place or guide at all. It is now, and it has long been, a body of derivative principles and concrete rules, formed by the action and re-action of each other, of custom, moral feeling, considerations of convenience. It is only capable of modification and extension either by the slow growth of fresh customs, under the influence of these other factors, morals and convenience, or by general express agreement amongst nations, — matters involving new principles or new rules, or fresh, unrecognized practices. No speedy way exists of changing the concrete rules of existing law otherwise than by the general agreement of civilized States; and to nothing else than these concrete rules is obedience due.

I concede that these concrete rules do not cover all cases. Probably the law never will be found to cover all possible cases; but the law is supplemented by treaty, by agreement between particular States; and you are in this instance, in discharge of the important functions which you have assumed, standing in the place of these parties, in connection with the branch of the question which I have not yet approached. But now you are to declare as regards the branch with which I am dealing, what are the rights, legal rights, according to existing law, of the parties, not looking beyond that law, until you come to the second branch of the question; then indeed you are to say for the parties what they would have said for themselves had they entered into an agreement to settle the differences existing between them.

Senator Morgan. — Is it to be determined according to existing international law, or existing municipal law, or both?

Sir Charles Russell. — I have already said that in my judgment international law, as regards property and things, has nothing to do with the questions in this case.

Lord Hannen. — That is to say, international law does not speak on the subject?

Sir Charles Russell. — It does not speak on the subject.

Senator Morgan. — The Treaty does not refer to the subject as either municipal or international, or to any particular law, municipal or international.

Sir Charles Russell. — Quite true, sir. It speaks, however, of rights which are to be ascertained by reference to law, as legal rights. I have dealt with the question of municipal law. I have attempted to show that there is no such right according to municipal law. I have also attempted to show — I hope you will think I have succeeded in showing — that there is no such right according to international law; but I have not exhausted that subject.

Senator Morgan. — I have not yet heard any reference by anybody to writings in which we are to find either the general principles or the concrete rules by which we are to be guided in the determination of what is the international law, or how much of it applies to this case.

Sir Charles Russell. — You will have the opportunity, Sir, before this case is over, of being referred to them.

Senator Morgan. — I hope so.

Lord Hannen. — Will you allow me to put a question to you?

Sir Charles Russell. — If you please, my Lord.

Lord Hannen. — You have argued that the municipal law of the United States has not made this property in the United States. Suppose there had been a law of the United States enacting that the seals on the Pribilof Islands should be the property of the State, would that have made any difference in the argument?

Sir Charles Russell. — None at all, outside the territorial limits. Of course, as regards their own nationals, it would.

Senator Morgan. — Outside the territorial limits?

Sir Charles Russell. — Certainly.

The Tribunal then adjourned until Thursday, May 25, 1893, at 11.30 o'clock A.M.

TWENTY-SEVENTH DAY. MAY 25TH, 1893.

Sir Charles Russell. — Mr President, I am now able to fortify by authority the correctness of the answer which I gave yesterday to the question you were good enough to address to me upon the question of how far the right of the King as to property in swans or in royal fish extended, and whether it extended, or was asserted to exist, beyond the territorial limits. The authority that I refer to is recognized as the principal authority upon the subject, — Chitty on the “ Prerogatives of the Crown ” — and I am reading from the edition published in 1820, page 144. It deals both with the question of royal fish and royal birds, swans. This is the passage : —

The King has no general property in fish. It would be superfluous to specify and particularly designate whales and sturgeons alone, as being royal fish, if all fish were the King's property. *Exceptio probat regulam*. With respect however to whales and sturgeons, it was always a doctrine of the common law that they belong to the King. And by the statute *de Prerogativa Regis*, it is declared that the King shall have whales and sturgeons taken in the sea or elsewhere, within the realm, except in certain places privileged by the King. But to give the Crown a right to such fish they must be taken within the seas parcel of the dominions and Crown of England, or in creeks or arms thereof; for if taken in the wide seas or out of the precinct of the seas subject to the Crown of England, they belong to the taker. A subject may possess this royal perquisite; first, by grant; secondly, by prescription within the shore, between the high water and low water mark, or in a certain *districtus maris*, or in a port, creek, or arm of the sea; and this may be had in gross or as appurtenant to an honour, manor or hundred.

Under this head may also be mentioned the right of the King to *swans*, being inhabitants of rivers. By the statute 22 Edward IV, chapter 6, “ no person other than the son of the King shall have any mark or game of swans, except he have lands of freehold to the yearly value of five marks; and if any person not having lands to the said yearly value shall have any such mark or game, it shall be lawful to any of the King's subjects having lands to the said value, to seize the swans as forfeits, whereof the King shall have one half and he that shall seize the other ”. A subject may, however, be entitled to swans; first, when they are tame; in which case he has exactly the same property in them as he has in any other tame animal; secondly, by a grant of swan mark from the King; in which case all the swans marked with such mark shall be the subject's, wheresoever they fly; and, thirdly, a subject may claim a property in swans *ratione privilegii*, as if the King grant to a subject the game of wild swan in a river.

That I think answers the question you were good enough to address to me. Blackstone in his Commentaries, (Stephen's Edition, page 2), states the law to the same effect. I need not trouble the Tribunal by reading it. Indeed one sees at once that in the nature of things it must be so, because once outside the territorial jurisdiction of the State those who owe no allegiance to that State owe no respect to any rights, regalia

or otherwise, which depend upon its laws. Of course the State might make any law to affect its own subjects, but as regards foreigners outside the realm it has no such right.

Lord Hannen. — If a royal swan at large in the country where the King had the right to swans escaped to another country where the other King had the same right to swans at large, which King would the swan belong to?

Sir Charles Russell. — Quite so, my Lord. For myself I should be prepared to back the right of the King in whose territory it was found.

The President. — Well Sir Charles I thank you very much for the explanation. It has been very useful to me at any rate. I believe the law is the same law that formerly prevailed in France under the feudal system, by which the right of chase and hunting was derived from the regalian right; and I believe the regalian right was exactly the same as that defined in the law of England which you have just read.

Sir Charles Russell. — This subject was mentioned yesterday at an advanced stage of our proceedings, and it may not be without interest to say that the discussion reached Ottawa, the seat of Government in Canada, in time to be digested there; and this morning Mr Tupper received a telegram which I might be permitted to read, as a matter of some interest. An erudite gentleman, Mr Griffin, telegraphs this :

Edward I of England, on knighting the Prince of Wales, swore to God on the swan that he would conquer Scotland. The swan was the heraldic sign for God, the Virgin, and Ladylove for all Knights. See Walter Scott's history of Scotland Volume 8, and also Brewer's Historical Handbook, page 861.

Now, Mr President, I come to the last ground on which the pretensions of the United States are based in argument, namely the ground that pelagic sealing interferes with a legal right in the industry, as it has been called, said to be carried on on the Pribilof Islands; but before I call attention to the way in which this proposition is put by my learned and ingenious friend, Mr Phelps, who has specially taken this proposition under his protection, I should like to remind the Tribunal of the hypothesis on which this question is to be considered. We are away from the question of property in the individual seals : we are away from the question of property in the seal herd. We are away also from the question of any exclusive right in the United States or the lessees of the islands, to kill the seals, or to take the seals, or to prevent other sfrom taking the seals in the high sea, or in a given area of the sea.

Therefore the proposition is that, although there is no such exclusive right, and no such property either in the individual seal or in the seals collectively, yet there is a right to complain, as of a legal wrong, of the fact that seals are killed in the high sea, whereby they are probably prevented from reaching the island. That is the proposition. Now I have to remind the Tribunal that what has to be established in this connection

is that sealing on the high sea is an invasion of some legal right connected with the industry on the Islands. I use the phrase "industry" for brevity. I shall describe presently what it is, and consider whether it deserves that appellation.

Now that is the broad proposition, which, stated in untechnical language, may be put thus : that if a nation has an industry on its shores which depends upon the resort to those shores of certain wild animals to take which such nation has no exclusive right, and in which it has no property, it can nevertheless prevent the killing of such animals on the high seas by another nation, if such killing prevents the animals reaching the island and so interfering with the industry.

I shall have to point out the far-reaching consequences of such a proposition as that : consequences which I think if applied to the interests and actions of the United States authorities themselves upon the eastern shores of America, will be found to be exceedingly awkward for them. But I postpone for the moment the illustrations upon that subject which I intend to submit.

I will ask the Tribunal to turn to the argument of my learned friend Mr Phelps as it is set out in the printed book. I do not refer to it for the purpose of going through it page by page. Examination of Mr Phelps' argument. I have stated the main proposition which is laid down in it, but there are certain statements incidently made in the course of that argument which I cannot pass without some notice. The first of these is on page 132. It is the sentence which runs thus :

The complete right of property in the Government while the animals are upon the shore or are within the cannon shot range which marks the line of territorial waters cannot be denied.

This the Tribunal will see is not relevant to the point as to the industry apart from property ; but I cannot pass it by without pointing out, as I have already done in relation to Mr Coudert's argument, and as I have already done in relation to Mr Carter's argument (though it did not appear there so prominently as in Mr Coudert's), that there is here, as it seems to me, a distinct misstatement of the law.

There is *no* complete property while the animals are upon the shore, or within cannon-shot at all ! The only right that exists is the right upon which I have already, I am afraid with painful reiteration, again and again insisted — the simple right, *ratione soli* : the right to capture, the right to kill, the right thereby to take possession ; but there is no complete right of property ; and therefore there is this fundamental error, as I conceive, at the basis of the whole of that argument as to property. To that point, however, I am not again going to refer.

On page 134 again, at the bottom of the page, is another misstatement, as I conceive it to be, which I wish to correct.

The whole herd owes its existence, not merely to the care and protection, but to the forbearance of the United States Government within its exclusive jurisdiction.

Now I wish simply to say that we know that that fact is not correct. If the United States had nobody there the seals would be there; if the islands were no man's land, the seals would be there — they would be there all the more because of the absence of man or human interference; and the very regulations which Mr Coudert described, by which dogs were forbidden, lest their barking should disturb the seals or frighten them, or keep them away — the very remoteness of human dwelling from the places of the seals — the fact that even smoking is forbidden lest it should frighten away the seals, their sense of smell being so acute — all these things go to show that it is an entire mistake on the part of the United States to suggest that the herd *owes its existence* to them. The herd would be there all the more if they were not there; and if they even attempted artificially to do something to induce them to go there it would have a repelling effect, and not an inducing effect; and all they do is the one thing which I have again and again referred to, namely, that for their own uses, and for their own purposes, they prevent trespassers raiding on the island.

I pass on to the next page, the top of page 135. I do not dwell upon it, but there is this statement of Mr Phelps : —

While the seals are upon United States territory during the season of reproduction and nurture, that Government might easily destroy the herd by killing them all, at a considerable immediate profit. From such a slaughter it is not bound to refrain.

It conflicts with the contention of my friend Mr Carter, and I leave them to settle their differences upon this point between themselves, venturing at the same time to express my preference for the law as laid down by Mr Phelps. I think he is perfectly right in saying that the United States may legally, if they can and choose, kill all the seals that come to the land; that there is no law which prevents such a slaughter; that they are not in any way bound to refrain.

Now on page 136 we come to the enunciation of a precise and definite proposition. The second sentence from the top proceeds thus : —

The case of the United States has thus far proceeded upon the ground of a national property in the seal herd itself. Let it now be assumed for the purposes of the argument, that no such right of property is to be admitted, and that the seals are to be regarded, outside of territorial waters, as *feræ naturæ* in the full sense of that term. Let them be likened, —

My friend is logical, and does not shrink from this inevitable result ;

Let them be likened, if that be possible, to the fish whose birthplace and home are in the open sea, and which only approach the shores for the purpose of food at certain seasons, in such numbers as to render the fishing there productive.

That is my friend's proposition; and then he proceeds to argue that, under such circumstances, there is an industry, the legal right to which is invaded (because of course, that is what he must affirm), by sealing on the high seas. To that proposition, of course, I must come back.

Now, on page 138, in the third sentence from the top, the character of pelagic sealing is referred to. I have already dealt with it, and do not recur to it; but, in the last sentence, he refers to the existence, in civilized countries, of laws (during the breeding season), protective of wild animals; in other words, he refers to the game laws.

Now, I must point out — I think I have already done so more than once, and, therefore, I will not dwell upon it, — I must point out that there could be nothing more significant to show that there is no property in game than the very existence of those game laws. The law steps in, and, in the interests of all who have a right to attempt to capture game, says that, during certain seasons, no attempt at capture shall be made. It in no sense affects property, — does not pretend to affect property. It simply says that that general right of taking animals *feræ naturæ*, — which is the equal right of all mankind, of all the subjects of the realm, with the difference, only, that there is greater opportunity for exercising the right where a man is the owner of land, — shall not be exercised during certain seasons of the year, shortly called “close time”.

Now, at the bottom of page 139, my friend states what he calls the “inevitable conclusion” from the facts that he has mentioned.

The inevitable conclusion from these facts is, that there is an absolute necessity for the repression of killing seals in the water *in the seas near the Pribilof Islands*, if the herd is to be preserved from extinction. No middle course is practicable consistently with its preservation.

I do not discuss that point in this connection. My friends have thought it right to mix up the two things, — claims of property right and Regulations. I do not. That is an assertion which my friend will be entitled to urge with such force as belongs to it when the question of Regulations is being discussed by him. It is not relevant to the question of property.

Then, on page 149, in the last sentence, there is a statement in these words.

Such was the view of the United States' Supreme Court in the Sayward Case, in respect to the operation of the Acts of Congress before referred to, for the protection of the seal in Behring Sea. In that case a Canadian vessel had been captured on the high sea by a United States cruiser, and condemned by decree of the United States District court, for violation of the regulations prescribed in those acts; and it was claimed by the owners that the capture was unjustifiable, as being an attempt to give effect to a municipal statute outside the municipal jurisdiction. The case was dismissed because it was not properly before the court. But in the opinion it is intimated that if it had been necessary to decide the question the capture would have been regarded as an executive act in defense of national interests, and not as the enforcement of a statute beyond the limits of its effect.

I have already read the judgment to the Court.

Mr Phelps. — Perhaps I might say that the number of the Volume in which the case is to be found is misquoted by a printer's error. Perhaps, Sir Charles, you have noticed that.

Sir Charles Russell. — I have, thank you, — 143 is the right Volume.
Mr Phelps. — Yes.

Sir Charles Russell. — I have read that case, and I beg to say that this statement, as I read that case, is quite incorrect — in fact, one of the Judges is here, and he will no doubt tell the Court; but we have the authentic record. It would be indeed a very extraordinary thing if the Court had attempted to say any such thing. It would indeed be an extraordinary thing for the Judges of the Supreme Court, or indeed of any Court, under the circumstances in which the matter was presented to them, to have attempted to express an opinion upon so weighty a subject which was not before them, because, when I was discussing the action of the United States' Government in relation to the seizures, I pointed to the judgment of the Court condemning the ship and imprisoning the men : and I pointed to the argument of the Solicitor General to the United States, Mr Taft, in the Supreme Court of Washington : and I showed how the case was put on *one* ground and *one* ground only; namely that of exclusive jurisdiction based upon the territorial effect given to the municipal Statute. There was no suggestion in the libel in the case, or in any part of the record before the Court, of the justification now suggested for the seizures as an executive act of self-preservation or self-defence; and therefore it would have been indeed an amazing thing if Judges of the eminence and position of those learned Judges had stepped aside from the case presented to them to express or intimate in the faintest degree an opinion on a point which was not before them, or argued before them, or even suggested before them.

The President. — Perhaps you might read us the passage from that opinion.

Sir Charles Russell. — If my learned friends will kindly give it to me, I will read it at once.

Mr Phelps. — We have not got it here this morning.

We will bring the volume of the Supreme Court, N° 143.

Sir Charles Russell. — I read the case with some care, and I found no such thing in the judgment. It is conceivable that I may have overlooked some passage in it, but my friend Sir Richard Webster has read it as well as myself, and we think there is no warrant for that statement at all.

Lord Hannen. — If it were, it would be only what we call *obiter dicta*.

Sir Charles Russell. — There is not even that.

Mr Phelps. — That is all I claim for it.

Sir Charles Russell. — I should have referred to it if it had existed, but I do not find even an *obiter dictum*.

The President. — If we can have the proper wording of that opinion, it would be better — at a later stage perhaps.

Sir Charles Russell. — Yes, I should be glad. — But as Lord Hannen has been good enough to intimate (and Mr Justice Harlan I am sure will recognize the accuracy of it), as that case was presented to the Supreme

Court, it would not be *ad rem* for them to express any opinion of that kind at all. Judges sometimes do, no doubt, express opinions away from the point before them, and those are called, and sometimes contemptuously called, *obiter dicta* — they are beside the question; they are quite away from the point; they are not necessary for the decision of the case. They, therefore, have more or less authority, according to the more or less important character of the Judge who pronounces them; but they are not cited as authorities, unless it is a judicial pronouncement on a matter in which it was relevant to the judgment of the Court that the opinion of the Court should be expressed.

The President. — As we have not the case of the *Sayward* before us we do not care if they are *ad rem* as to the “ Sayward ” Case; but they may be of interest to us as being an important opinion — a weighty opinion.

Sir Charles Russell. — I do not at all mean to undervalue the opinion of any Judge of eminence or position — what I meant to say was, that it is no authority.

The President. — No, it is no judicial authority.

Sir Charles Russell. — I conceive it to be difficult to suppose that there will be found to be even an *obiter dictum*, because, as I have said, of the argument of Mr Taft, which I read pretty fully to the Court.

Mr Phelps. — I was wrong in supposing that we had not got the book here. There is a book here containing the opinion : I was not aware of it.

Sir Charles Russell. — Which is the passage?

Mr Phelps. — The passage is one of some length.

It is *here* [indicating].

Sir Charles Russell. — I will read it at once with pleasure.

The President. — Perhaps Mr Phelps will be kind enough to read to us the part which he deems important.

Sir Charles Russell. — What is the book?

Mr Phelps. — It is a collection of pamphlets, and it contains the opinion of Chief Justice Fuller.

Sir Charles Russell. — I want the report.

Mr Phelps. — This is the whole report, I am quite sure of it. It is usual to quote from this in Washington, and it is a pamphlet issued by the office.

Sir Charles Russell. — Perhaps you will kindly show it to my friend, Sir Richard Webster.

[Mr Phelps handed the book to Sir Richard Webster.]

Sir Charles Russell. — The volume of the report is 143.

The President. — Sir Charles, if you think it material it can be got a little later.

Sir Charles Russell. — I do not think it the least material.

The President. — Perhaps you might reserve it for the afternoon.

Sir Charles Russell. — Yes, except that my friend thought he could

put his hand on the passage. — I was willing to read it at the moment.

The President. — Rather than read it in a hurry we had better wait until the afternoon.

Mr Phelps. — If my friend will excuse me, we have marked the passage, which occupies several pages in the opinion of chief Justice Fuller, which I shall contend more than bear out the statement that I have made in the argument, that although unnecessary to the decision of the case, which went off as I have stated on other grounds, it did intimate an opinion to the effect stated in my argument. I have marked the passage for the use of my friend. I supposed it was not here, but I found it was.

The President. — Perhaps you will prefer to keep the reading of this passage for your own argument.

Mr Phelps. — Yes, unless my friends wish to read it for their own purposes.

Sir Charles Russell. — I am perfectly willing to read it.

Mr Phelps. — I do not ask them to read it.

Sir Charles Russell. — I care not; but it is not necessary for me to stop at this moment.

The President. — If it is not necessary to stop for the moment perhaps you will leave Mr Phelps to refer to it, and if he will be kind enough to refer to it in his argument, we shall be glad.

Lord Hannen. — Have you not read it?

Sir Charles Russell. — I had thought I read all, my Lord, that had any bearing on the question — I read from the report that was given to us — the report of Chief Justice Fuller's judgment.

Mr Justice Harlan. — I have no doubt the document you have there is a correct report of the opinion. I thought you had the authority.

Sir Charles Russell. — That is how I read it.

Mr Justice Harlan. — I have no doubt it is accurate.

Sir Charles Russell. — I can find nothing to that effect : that is all I can say.

Sir John Thompson. — It strikes me, Sir Charles, that perhaps the difference is in the interpretation of the judgment of the Court — not of the argument of Mr Phelps as contained in this book. Do you controvert the version given by Mr Phelps in his argument because you conceive the solution to be a statement that the seizure of these vessels was an executive act done in defence of the property in the fur-seals, for if that is your interpretation of Mr Phelps, argument, my recollection of the "Sayward" case is that the judgment of the Court did not justify that, but that the judgment of the court did establish this position, in so far as it could establish anything by a dictum — that what had been done in relation to the seizures of these vessels was an executive act.

Sir Charles Russell. — Clearly so.

Sir John Thompson. — Done in pursuance of an interpretation by the Executive of its property rights; and therefore, the judicial branch of the Government would not interfere with this interpretation.

Sir Charles Russell. — I am very much obliged to Sir John Thompson for this interposition, because of course my whole argument goes to show that the condemnation of these ships was based on the executive action of the United States invoking their municipal law, and alleging that the extent of that municipal law, territorially regarded, embraced the place where the ships were seized : and that therefore they were subject to municipal law, which exacted a certain penalty for being engaged there in sealing. But that is not the proposition which my learned friend has stated here — nothing like it.

The President. — Mr Phelps in his argument does not refer to the judgment. He refers to the opinion. He says : « In the *opinion* it is intimated ».

Sir Charles Russell. — That means the judgment, Sir.

Mr Justice Harlan. — No.

Sir Charles Russell. — What does it mean then?

Mr Justice Harlan. — The judgment of the Court is something different from the opinion of the Court.

Lord Hannen. — But when you speak of the *opinion* of the Court that commonly, with us, means the judgment.

Sir Richard Webster. — The reasoned judgment.

Mr Justice Harlan. — It is not always the case in America. An opinion is often separate from a judgment, but as a general rule you find, in the opinion, all that is essential to the formal judgment. That is added as a record of the Court, and you refer to the opinion for the purpose of interpreting the mind of the Court on the question submitted.

Sir Charles Russell. — The matter stands in America, and in England, upon precisely the same ground. A judgment, properly so called, is the result of the opinion arrived at by the Court.

Lord Hannen. — And is a formal thing, drawn up by some officer of the Court.

Sir Charles Russell. — Yes : “Judgment for the Plaintiff”; “Judgment for the Defendant” — that, technically, is the judgment; but the *opinion* is the reasoning of the Court upon which the technical judgment is based, and that opinion is called, in England, the *judgment* of the Court, and is cited as the judgment of the Court, and I think it is the same in America.

The President. — Is it considered to have the same authority as the judgment itself? — That is, in France, would it not be what we call *Les Considerants*?

What you call the “opinion” that precedes the judgment and justifies the judgment, is of no judicial authority; it is merely a moral authority.

Lord Hannen. — It is, that the Court for the reasons given, has delivered such a judgment.

Sir Charles Russell. — May I point out the difference Mr President? The mere judgment, (if it were to be restricted to the technical verdict for the plaintiff, or judgment for the plaintiff, or judgment for the defendant), would be no authority at all except as between those two liti-

gants; it is the *opinion* or the reasons, upon which that result has been arrived at, which is the authority cited for the guidance of future Courts of co-ordinate jurisdiction; and, if it be the judgment of a Superior Court, for the control of Courts of inferior jurisdiction.

Mr Justice Harlan. — The opinion is the authority — is a precedent in future cases, according to the inquiry whether the Court in so talking kept within the case? That is the point.

Sir Charles Russell. — I quite agree.

Lord Hannen. — Whatever leads up to the judgment is properly referred to as part of the opinion which is binding in the future; that which does not lead up to it, is not referred to as binding, but is simply, (to use a phrase which has been already used), the *obiter dicta*.

Mr Phelps. — If my friend will allow me it may be well that the Tribunal should understand precisely what I have undertaken to say in my argument.

Sir Charles Russell. — To what page do you refer?

Mr Phelps. — The last words on page 149. Referring to the “ Sayward ” case I say :

In that case a Canadian vessel had been captured on the high sea by a United States cruiser —

Sir Charles Russell. — I read the whole of it.

Mr Phelps :

by a United States cruiser and condemned by decree of the United States District Court for violation of the regulations prescribed in those acts; and it was claimed by the owners that the capture was unjustifiable as being an attempt to give effect to a municipal statute outside the municipal jurisdiction. The case was dismissed because it was not properly before the Court. But in the opinion it is intimated that if it had been necessary to decide the question, the capture would have been regarded as an executive act in defence of national interest and not as the enforcement of a statute beyond the limits of its effect.

Now if my learned friend will take the trouble to read the passage in the opinion which I have just marked and handed to Sir Richard Webster, he will find that I have correctly stated the intimation of the Court, as contained in the opinion, on the main question by which it was able to dispose of the case.

The President. — Do you mean to say that the passage you have mentioned implies that the act of the Executive would have been justified?

Mr Phelps. — No : it implies, in my judgment, that the Court would have held, that being an executive act it was not subject to judicial inquiry.

Sir Charles Russell. — Oh !

Mr Phelps. — Not that they would have undertaken to decide as between Nations the diplomatic question, but that so far as the judicial question was concerned the judgment of the Court below would have been affirmed upon the merits, if the merits had been decided.

The President. — But Mr Phelps, in your Constitution I believe the acts of the Executive come under the judicial power ?

Mr Phelps. — Not as to foreign Nations. Sometimes, as between the Executive and the citizens, they are subject to review by the Courts; but, as between the Government and a foreign Nation, the judicial power has nothing whatever to do with questions of that sort.

The President. — If the Executive does wrong, other foreign Nations appeal to the judicial power, — is that what you mean?

Mr Phelps. — If the Executive does wrong, — it is hardly for me to argue it at this time, — it is a matter for adjustment between the two Governments.

The President. — I must say that somewhat alters my own view about what was the action of your Constitution.

Sir Charles Russell. — The President will see that that is a very different statement from the statement in the Case, because the statement in the Case is that there was an intimation by the Court, if it had been necessary to decide it, that the capture would have been regarded as an executive act in defence of national interests. I respectfully say that no such opinion is intimated.

My learned friend has now read the book which Mr Phelps was good enough to hand to him, and which is exactly, my learned friend says *verbatim*, the same as the judgment I read to you. I have now got it before me; and I will read the passage.

Before I read it, may I point out what the statement of my learned friend now is, as to which I agree? What he says is this, that the Legislature of the United States having by their Statute assumed territorial jurisdiction over a certain area of the sea, and having by their executive action put that Statute into operation, the Judicial Tribunal would not go behind what the Executive had done and what the Legislature had done, but would recognize the fact that they had claimed *de facto* territorial dominion and no more. That is clear from the passage I read.

May I read it again? This is on page 16 of what I think is a regular Report, and *verbatim* the same as the passage my learned friend referred to :

If we assume that the record shows the locality of the alleged offence and seizure as stated, it also shows that officers of the United States, acting under the orders of their Government, seized this vessel engaged in catching seal and took her into the nearest port; and that the Law Officers of the Government libelled her and proceeded against her for the violation of the laws of the United States in the District Court, resulting in her condemnation. How did it happen that the officers received such orders? It must be admitted that they were given in the assertion, on the part of this Government of territorial jurisdiction over Behring Sea to an extent exceeding 59 miles from the shores of Alaska :

That 59 miles is mentioned, you will understand, because the vessel was caught at about that distance.

That this territorial jurisdiction, in the enforcement of the laws protecting seal fisheries, was asserted by actual seizures during the seasons of 1886, 1887 and 1889, of a number of British vessels; that the Government persistently maintains that such jurisdiction belongs to it, based not only on the peculiar nature of the seal fisheries and the property of the Government in them, but also on the position that

this jurisdiction was asserted by Russia for more than 90 years, and by that Government transferred to the United States, and that negotiations are pending on the subject.

And then he proceeds, on the lines my learned friend refers to, to point out that in the Statute as finally enacted, the words “ all the waters of Behring Sea in Alaska embraced within the boundary lines mentioned and described in the treaty with Russia of 1867 ” were omitted, and the expression “ all the dominion of the United States in the waters of Behring Sea ” was substituted.

Then he proceeds :

If reference could be properly made to such matters (for the act, as finally approved, must speak for itself) still we do not concur in the view that it follows that Congress thereby expressly invited the judicial branch of the Government to determine what are “ the limits of Alaska Territory and the waters thereof ”, and what is “ the dominion of the United States in the waters of Behring Sea ”, and think, on the contrary, that there is much force in the position that, whatever the reason for the conservative course pursued by the Senate, the enactment of this section with full knowledge of the executive action already had and of the diplomatic situation, justified the President in the conclusion that it was his duty, under Section 3, to adhere to the construction already insisted upon as to the extent of the dominion of the United States, and to continue to act accordingly. If this be so, the application calls upon the Court, while negotiations are pending, to decide whether the Government is right or wrong, and to review the action of the political department upon the question, contrary to the settled law in that regard.

Therefore my friend's latter statement is quite correct. I quite admit it, but it is not correct to say, as stated in the printed Argument, that the Court intimated an opinion that the capture could have been justified in law as a defence of national interest. That is the main dividing line between us.

Now, Mr President, I come back to the question, and I repeat the hypothesis on which it is to be regarded, — the *datum* for the argument. I have to assume, and the proposition that my learned friend advanced assumes, that there is no property in the seal, and no property in the seal herd. I have also a right to assume that the general right of fishing acknowledged by the Treaty of 1824 between Russia and the United States, and the same general right of fishing acknowledged by the Treaty of 1825 between Russia and Great Britain, did not except any living thing in the sea. I have further to assume that that was but a *recognition*, in the case of the waters of Behring Sea and the other waters, involved in the controversy which led up to those Treaties, of the general right of all mankind to fish in the sea and to take therefrom outside territorial waters whatever they are able to capture. These are the hypotheses, these are the data, in view of which this proposition must be approached; and I say it without any affectation, with the greatest respect for my learned friend Mr Phelps and for his ingenuity, that I find it difficult to understand and to appreciate what it is that I have to meet on this part of the case. The lessees may be treated, for the purpose of this discussion, as the owners of the islands and the owners of the industry. What is their position? What is their industry? They

wait until the seals come to the islands, and, when the favourable opportunity offers, they select such as they desire to kill, and adopt the best means they can for killing them. They are in this exercising their right as owners of the territory. Nobody disputes their right. They may extend that right still further, assuming them to be the possessors of the island, as I am doing for simplicity's sake, and if they choose they can supplement their killing on the island by killing within the three miles of territorial waters, and by claiming to exclude, and rightfully claiming to exclude, all others from that area; and, if they choose further, they may go out on the high seas and compete with others who are sealing upon the high seas. These are their rights fully and exhaustively stated: their right to kill the seals on the land, — an exclusive right; their right to kill within the territorial waters, — an exclusive right; their right, on terms of equality with all whose interest or convenience may prompt them to resort to the high seas, to pursue and kill the seal.

Where is the right that is invaded by that pelagic sealing? Where is the legal right invaded? Because, to constitute an invasion of a right, you must first prove the existence of the legal right. It is not enough to prove that their industry (if I must use that phrase) may be less profitable to them because other persons, in the exercise of the right of sealing on the high seas, may intercept seals that come to them, — that may be what lawyers call a *damnum*, but it is not an *injuria*; and I have no doubt the legal minds I am addressing understand the distinction between the two.

Let me assume that the island is divided by a boundary line, between two owners, one half of the island, given to A., the other half given to B. Would A. have an action against B. — could he complain that B. had perpetrated a legal injury upon him, if B. not merely killed the seals that came to his own division of the island, but exercised his right of sealing on the sea and killed seals there which might have gone, or some of which might have gone, to the land of A: if B. had in other words exercised his right to kill on the high sea? That would have been a case in which the profits, or the volume of A's business, might have been diminished, and he would, therefore, have suffered a loss, a *damnum*; but a *damnum* does not give a legal right of action. There must also be the *injuria*, — the invasion of the legal right; There must be *injuria cum damno*; the combination of the two.

The President. — Unless done maliciously.

Sir Charles Russell. — You, are good enough Mr President, to anticipate the very next topic, — perhaps not immediately the next, but a topic to which I am going in a moment to advert.

Let me illustrate the position of things a little further by putting an imaginative case or two. Suppose there was no industry on the island at all; it will not be denied that we could kill on the high seas; or, if it be denied, it will not be denied with very much efficacy; our right would be undoubted. Again, suppose that from some cause or another (I care not what), the United

Position of malice in
the enquiry examined.

States should find it beneath its dignity, or not conducive to its profit, to carry on this industry on the islands, — say, that it does not pay, for instance : they cease to carry on the industry. Should we still be without our right to seal on the high seas? Clearly not. Can it be said that our rights, or their rights relatively to us, shift and change according to the eventuality of whether there is or is not, according to their own interest for the time, an industry carried on there? It is impossible that legal rights can be of this shifting and varying character. No, Mr President; their rights are strictly those which I have enumerated; the right to kill on the islands exclusively; the right to kill within the territorial limits exclusively; the right to compete on the high seas on terms of equality with all the rest of mankind : and that is the whole statement of their legal, positive rights.

But there is another right, I admit. They would have a right to complain (and this meets the whole of the illustrations which all the ingenuity of my learned friends have supplied) if it could be truly asserted that any class or set of men had, for the malicious purpose of injuring the lessees of the Pribilof Islands and not in regard to their own profit and interest and in exercise of their own supposed rights, committed a series of acts injurious to the tenants of the Pribilof Islands. I agree that that would probably give a cause of action; and, therefore, they have the further right (what I may call the negative right) of being protected against malicious injury.

Now I have stated, I conceive exhaustively, as a lawyer would state them, and as a lawyer I respectfully think ought to state them, what are the rights of the owners of the Islands in relation to this so-called industry.

The point, Mr President, to which you were good enough to refer is well illustrated by reference to the case I mentioned yesterday, *Keeble v. Hickeringill*; and the passage is at page 116 of the printed Argument in the United States. In the Report of this case in the 11th Modern Reports, at page 75, Lord Chief Justice Holt says :

Suppose the defendant had shot in his own ground; if he had occasion to shoot it would be one thing, but to shoot on purpose to damage the plaintiff is another thing and a wrong.

That brings out clearly and neatly the distinction; that is to say, that when a man is exercising his right, a right which I assume that I have established by reference to the general law and by reference to the Treaties —, to kill seals on the high sea, and he pursues that avocation or industry for the purpose of making a profit to himself and making it legitimately for himself in that way, not thinking of injuring anybody but merely of enriching himself in the exercise of what he conceives to be his right, his act cannot be regarded as malicious : and there is, from beginning to end of this case, no suggestion that the action of the pelagic sealer could be properly regarded as malicious, or be attributed to any other motive than that of self-gain in the exercise of a supposed right.

The President. — Would you consider, as having a certain maliciousness in itself, what has gone on during the last two years, where the *modus vivendi* has impeded the process of seal killing on the islands and left in the open sea, in the Pacific, at least, and on the North-west Coast, the pelagic sealing quite free. We have witnessed, according to the statistics which were read to us, I might say an extraordinary increase of the pelagic sealing during these two years, during this sort of « close season, » — at all events, close season for the Americans : — is that quite free from maliciousness in your eyes?

Sir Charles Russell. — Absolutely. Let me suggest this ; or, rather, let me first make the ground perfectly clear. The first time that the suggestion of the word “ malice ” has occurred here comes from you, Mr President. You will not find a trace or suggestion of it in the Case, or in the diplomatic correspondence.

The President. — But malice may exist without suggestion.

Sir Charles Russell. — You are dealing with this case, I presume, Sir, like every other Tribunal, according to the case presented, supplemented by such additional light as your own erudition may bring to bear upon it. The case is not presented as a malicious injury, but as the case of an invasion of a legal right. That is what I meant to urge upon you ; but I would like to consider it a little more closely for a moment.

In the pelagic sealing which occurred after the *modus vivendi* many persons took part belonging to various nationalities. You will bear in mind, of course, that the people who engaged in this were not Canadian sealers only, but were American citizens also. It is a little strong to suggest that the American sealers were pursuing this pelagic sealing not to benefit themselves, not to put profit into their own pocket by the pursuit of what they conceived to be a right, but were doing it maliciously to injure the property of the nation to which they belonged. I think the suggestion, with great deference, will not be found to be sustained by any facts.

The President. — I merely want to make the matter quite clear. I did not suggest anything myself, of course.

Sir Charles Russell. — The point I wish to emphasize is this. My learned friends are acute lawyers, as of course you know, and men of eminence. They know how best to frame their case in the way that seems to them strongest. We have seen how they have departed in a large measure, as I conceive, from the original case put forward, and as I have endeavoured to demonstrate, in the diplomatic correspondence, and how, in this elaborate written argument, they have formulated in the best way they conceived it possible to formulate it.

They know as well as any of us that there is the greatest distinction in point of law as to the legal liability for acts done maliciously and for acts not done maliciously ; and therefore, as they cite such cases as *Keeble v. Hickeringill*, if it had been intended to suggest that the pelagic sealers were doing this not to profit themselves, but to injure the tenants of the

Pribilof Islands or the United States interest in the Pribilof Islands, we should have had, of course, some definite suggestion of that sort.

Lord Hannen. — I follow your argument so far, but does that argument meet an illustration of Mr Phelps? Suppose dynamite was used for the same purpose and resulted in the wholesale destruction of fish, that would not be malicious, because it was done for the purpose of immediate gain. What would you say to that case?

Sir Charles Russell. — I have not forgotten that illustration, and as you mention it, my Lord, I will come to it at once. I am taking it a little out of order. The case my friend has put in that connection is this, that where the use of dynamite would cause a wholesale destruction of fish with a small and disproportionate gain to themselves it would be illegal : that is my learned friend's proposition. To begin with, I should say that it might be very strong evidence, as one would say in our English Courts, to go to the Jury, of malice ; but it is not every act which causes destruction, and even destruction which may be disproportionate to the gain derived, which constitutes an actionable wrong. Let me illustrate that in a way that will be familiar to each Member of the Court. Take, for instance, the mode of fishing known as trawling. I think you all realize what trawling is : that mode of fishing -- dragging a heavy beam with a net along the bottom -- has the effect of destroying enormous quantities of small fish and, still more, of disturbing spawning ground, and causing an enormous amount of mischief in the destruction of fish.

Has any international law ever declared, or has any nation ever asserted that that destruction outside its territorial limits, — because trawling goes on many miles out at sea and in very deep waters — would give a cause of international complaint as a matter of right against the trawlers of another nation? No, because on the high sea all are equal ; and although that particular method is a destructive method, the case is met in the only way in which it can be met, by regulations, by conventions, but not by the assertion of a legal right to prevent the trawling, even although it cause that great mischief.

Lord Hannen. — Are there conventions on that subject?

Sir Charles Russell. — Oh yes, my Lord — conventions, as the President will tell you, between France and Great Britain on that very subject. I will mention later conventions between Canada and the United States with a view to preventing the use of dynamite by the nationals of either country on the high sea.

Then may I also put the question with reference to the use of dynamite from another point of view? One might use dynamite for the purpose of trying some very important experiment, or testing some important invention connected with war — torpedo experiments, or what not — these may be tried upon the high seas, outside territorial waters ; and yet such experiments may be conducted in such a position as regards an adjoining nation that very considerable mischief may be done temporarily to the fishing interests of that particular nation. But that would be a perfectly

legitimate use of the high sea. The nation conducting the experiment would be acting for a justifiable cause, and within its right; and if, acting within a right, it causes damage to another person, it gives that other person no cause of complaint, because no legal right of his has been invaded.

Senator Morgan. — It seems to me we are getting into a difficulty here by failing to take notice of the well-established distinction between express and implied malice. The law implies malice from any wanton act done against the life or property of another, or from any act that is necessarily destructive of the life or property or business of another — when that is a requisite element in the right of action. The law implies it from the nature of the act.

Lord Hannen. — But that implication may be met by showing it was done with an excusable cause.

Senator Morgan. — Always; but if a process by which a certain species of property is destroyed, as by dynamite, is used in the neighbourhood of property which belongs to another person, that process would be considered malicious in law and the answer that it was done in pursuit of a legitimate object would not be good. For instance, if the sealers draw up a cordon of ships around the three mile limit, and take seals there as they come to and as they go from the Pribilof group of Islands during the breeding season, taking them indiscriminately — then it would scarcely be held I think by any Court that that was an act from which malice would not be implied.

Sir Charles Russell. — Surely Mr Senator you are putting an impossible — an extravagant case; but I will tell you what the remedy would be; and here lies I think the confusion that has prevailed in the branch of the argument which deals with the rights of self-defence and self-preservation. In such a case as that the United States would say: whether we have a legal right or not, this is a matter so important to us that we will take our stand and make it, if need be, a matter of war. That is what they would say.

Senator Morgan. — Or an Arbitration such as this.

Sir Charles Russell. — No: this Arbitration has nothing to do with rights of war. This is to declare legal rights in time of peace.

But I must follow up this point, as the President has broached it for the first time, and I was not intending to do more than make a passing allusion to it. The suggestion of the learned President is that the sealing outside Behring Sea and under the *modus vivendi* of 1891, and of 1892, while they were in operation, might itself — of course he was not expressing any opinion — but he suggested whether that might not be regarded as malicious. Let me recall the facts. The United States has the power to control its own citizens everywhere. It had the power both before its acquisition of this territory and after its acquisition of this territory, to impose any restrictions it chose upon its own nationals wherever those nationals were. After 1867, the United States acquired an interest in these islands: the nature of that interest we are now discussing. Is it

not a little strong to say, or even to suggest, that they could have regarded the pelagic sealing of their own nationals, carried on from 1867, for a period of so many years, as a malicious injury to them? We have the extraordinary fact that according to the law of the United States, as it is to-day, pelagic sealing outside Behring Sea is a perfectly lawful thing; and yet it is to be suggested that pelagic sealing outside Behring Sea was a malicious thing done to injure the United States. So regarded, the suggestion becomes grotesque.

I do not know whether the learned President realizes the point I am now putting : that absolutely according to the law of the United States as it is to-day pelagic sealing is a lawful pursuit outside Behring Sea.

The President. — I perfectly realize what you state, and what the American counsel have argued, but we must keep in remembrance that all these matters are extremely recent — pelagic sealing has not been found fault with until 1886. Very few years have passed, and in all countries the action of legislation is always slow.

Sir Charles Russell. — With great deference, I am dealing with the thing as it is. Pelagic sealing has gone on as the oldest pursuit of seals from time immemorial. Since the time that seals were first hunted, they were hunted *pelagically*, and it is no answer to say that it was then conducted upon a scale and at a time when it did not affect, in a material degree, the interest of the United States. But I am coming a little closer to the action of the United States. The learned President refers to the years 1891 and 1892, but is he aware that the books before him show that in 1891, engaged in pelagic sealing, outside Behring Sea, were 48 *American vessels*, and in 1892 outside Behring Sea were engaged 46 *American vessels* — lawfully, according to the law of the United States, engaged in this pursuit of pelagic sealing, and engaged in it ever since 1880; because although it increased, as the learned President quite rightly said, in later years, and increased considerably in later years, it still was not without a certain volume of importance even during earlier years. The suggestion is worth following. In the first volume of the Appendix to the United States Case, there is a table giving the nationality of the vessels engaged in pelagic sealing.

Sir John Thompson. — I thought the decision you lately read, Sir Charles, was to the point that if the defendant had had no occasion to shoot or kill birds or animals on his own land, it would have been malice prepense?

Sir Charles Russell. — Yes, but as the learned President has mentioned the subject I think it respectful to pursue it a little further.

Sir John Thompson. — Before you finish I should like to ask you to satisfy me upon what branch of this enquiry we have given us in charge the question of malice prepense.

Sir Charles Russell. — I do not know, because it is not alleged. I hear of it for the first time.

Lord Hannen. — You take the point that it is not amongst the *allegata*.

Sir Charles Russell. — It is not amongst the *allegata*.

Sir John Thompson. — I am not upon that, but upon what branch of the Treaty is this? on what question — Jurisdiction, property interest, or regulations?

Sir Charles Russell. — I do not know. I cannot say.

Mr Justice Harlan — I suppose it arose from the distinction you were making between the destruction of the industry maliciously or by simple pursuit, and what you regard as a right.

Sir Charles Russell. — Yes. The way, probably, it would be said to have some relevance is this. I was stating what were the positive rights attached to an industry; and I was stating what negative rights an industry had: the negative right I indicated was, to be protected against a malicious injury. They do not complain of malicious injury.

The President. — Supposing an allegation of malice had been made — it is not the case — it would refer would it not to question 5?

Sir Charles Russell. — I find it difficult to say that it would; but I assume that it would for the moment.

The President. — Until the regulations come to be considered.

Senator Morgan. — It seems to me it refers to the third question of Article I. The third question of Article I concerns the rights of the citizens of both countries to take seals in the open sea.

Sir Charles Russell. — No, Sir, with deference.

Senator Morgan. — “The rights of the citizens and subjects of either country as regards the taking of fur-seals in or habitually resorting to the said waters.”

Sir Charles Russell. — That Article is “*The questions which have arisen*,” concerning, and so on. Then the formulation of the questions to be answered is to be found in Article VI.

Senator Morgan. — I do not so understand the Treaty. Those are the points in Article VI. Not questions, but subdivisions of questions.

Sir Charles Russell. — I was about to call attention to a Table which I have before me. First however I wish to note the fact that on page 108 of the first volume of the Appendix to the Case of the United States, it appears that as early as 1876 an American vessel called the “*San Diego*” was seized for sealing near Otter Island, which is close to the Pribilof Islands.

Mr Justice Harlan. — Is not that 1883?

Sir Charles Russell. — No, Sir, 1876 — she was an American vessel.

Mr Justice Harlan. — The “*San Diego*”?

Sir Charles Russell. — The “*San Diego*”. She was seized again later. That probably will explain it. There are several vessels of that name, but this one was seized in 1876.

Now the Table to which I was calling attention, and which faces page 590 of the same volume, shows that in 1880 there were 7 British and 9 American vessels.

In the year 1881 there were 7 British and 2 American.

In 1882 there were 12 British and 3 American.

In 1883 there were 10 British and 3 American.

In 1884 there were 5 British and 6 American.

In 1885 there were 3 British and 11 American.

I need not follow it to the end. The columns are long, and will take some time to add up : but when you get on a little further they seem to be about equal numbers all through ; and towards the end I think there are more British. I therefore treat this matter in this way.

Mr Phelps. — The British Commissioners' Report increased the number of British vessels.

Sir Charles Russell. — My friend Mr Phelps says that the figures given by the British Commissioners increase the number of British vessels in later years. That may be so. It does not touch my argument.

The matter therefore stands thus : Pelagic sealing outside Behring Sea lawful by the law of the United States ; no allegation that the pursuit of such sealing, although contrary to the United States law, which binds only its own nationals, inside Behring Sea, was contrary to the law outside Behring Sea, or was maliciously pursued either inside or outside. And lastly the point which Sir John Thompson has suggested, and which I have already endeavoured to make — that no suggestion of malice can be maintained when the thing is done in pursuance of what is claimed to be a right, and for the profit of the individual who pursues that right.

Further, if it is necessary to add anything else — if malice can enter into this question at all — it must be malice in the *individual* : you cannot attribute malice to a mass of individuals. Therefore I think I have given sufficient reasons why my friends have not made this point. It would be a bad one if they had made it. They have made some points which I cannot think are good ; they have not made this point, which I submit would be utterly bad.

But now I have to call the attention of the Tribunal to what would have been the far-reaching consequences of this contention : I have stated, simply and I think correctly, the contention of my learned friend as follows — that when a nation has an industry on its shores which depends on the resort to its shores of certain animals which that nation has no exclusive right to take, and in which it has no property, it nevertheless may claim that the killing on the high sea is an invasion of its right, although such killing is itself done in the exercise of a right, if the result of that killing is to interfere with the animals reaching the land, and so to lessen the possible profit which may be made on the land.

The rights
in an "industry"
examined.

We know what rights are attached to an industry. There is the right to carry on the business. If there is a good-will ; there is a right to the good-will. If there are trade-marks in connection with the business, those trademarks may be protected. It may be defended against malicious attack. But this exhausts the statement of the rights, both positive

and negative. There are no other rights in connection with it known to the law : the catalogue is exhaustive. Always bearing in mind that we are arguing upon the assumption of no property and no exclusive right, let us see what would be the consequences of this new principle which is asserted? Where will it land us?

Just let me put some of the cases. Take that large and increasing volume of industries carried on upon the west coast of America, and along the coast of British Colombia, and stretching further north along the Alaskan coast, known as the salmon canning industries. You, probably, Mr. President, hardly appreciate what an enormous industry that is. Unless you have visited the neighbourhood of the Willamette river, as I have had the opportunity of doing, and of Portland, in Oregon, you can form no idea of the extent and importance of that great industry as a means of food supply to mankind. Supposing by some modern system and improved method of catching salmon, neighbouring nations should be attracted to the fishing, and catching large numbers outside the territorial waters should intercept the salmon on their way up the rivers where they would be brought within the reach of this industry : is it to be said because the canning industry would be thereby injured, that there would be a *legal right* to prevent the fishers from operating outside the territorial waters on the ground that they prevented the salmon coming up the river to the place where they could be more conveniently caught? Once you have realized that exclusive right to take is out of the question, the parallel is complete.

Take another illustration : the case of the fishery on the coast of Newfoundland — a matter largely debated, for many reasons — an enormous industry carried on on the coast by reason of the possession of that territory of Newfoundland, not merely because the sailors are in a convenient position to go to sea and catch the fish, but because their ownership of that territory enables them to do an enormous trade, to carry on an enormous industry, in curing fish upon the land. Supposing that that industry is found to be greatly affected, because some enterprising American sailors and fishermen go outside the three-mile limit and catch enormous quantities which would otherwise have come within the three-mile limit, and so nearer to and within easier access of the Newfoundland fishermen : suppose that the interference were so great that their industry should droop and their commerce should be blighted : would that give them any legal right? None whatever.

Again, take the case of the Guano Islands in the south, where the deposits of countless myriads of birds, over many years, have caused there accretions of enormous value in the shape of guano. Supposing some change of fashion took place, which offered a fitting reward to the sportsman or to the hunter to kill these birds in their tens and hundreds of thousands for the sake of their plumage, and that thereby this great and profitable guano industry on the islands were impaired, nay, brought to an end. Could the owners of the islands complain that

because they were carrying on an industry on the islands, a valuable industry, an important industry, and because that industry was attacked by these men in shooting these tens of thousands of birds outside the islands, that *therefore* that shooting was wrong?

Or take again the illustration, which is an apt one, as it seems to me, where the collection of the eggs of the wild birds of the air is an important industry, as it is upon many islands, as it is in connection with some of these very islands in Behring Sea. I have got here before me a book which I should like to hand to the Tribunal to examine. It is a Report of Mr Elliott in 1874, the one that is referred to by my learned friends in some parts of their case and argument, in which he refers —

Mr Foster. — We discuss your reference to it.

Sir Charles Russell. — Really I do not understand you.

Mr Phelps. — We do not refer to it. We do not understand it is in the Case. We have not seen it.

Sir Charles Russell. — Not seen it? Not seen the report of 1874?

Mr Justice Harlan. — Sir Charles is talking of the Report of 1874.

Mr Phelps. — Elliott's Report of 1874. It is not in *our* Case.

Sir Charles Russell. — I am at a loss to know what the interruption means.

Mr Phelps. — It means that we were suggesting that the document from which my friend is about to read is not in the Case. It is not in evidence that I know of, and therefore I have not examined it.

Mr Justice Harlan. — It is cited either in the British Case or Counter Case.

Mr Foster. — That is what I said. It is cited by *them* — not by *us*.

Sir Charles Russell. — It is cited again and again. Why I should be interrupted I do not know. I do not complain of the interruption, but I do not understand its cause. I think I am well founded also in saying it is referred to by Mr Blaine in his earlier correspondence.

Mr Carter. — We have not referred to it ourselves in our Case. We have carefully avoided everything of Mr Elliott's.

Sir Charles Russell. — Well, that is rather an awkward admission, which my learned friend perhaps had been wiser not to make.

Mr Carter. — We are willing to admit it.

Sir Charles Russell. — Because this is the gentleman whom they constituted a special Commissioner by a special Act of Congress in the year 1890. He was the creation of Congress to go out to make a report on the Pribilof Islands.

The President. — Is there any reason why the scientific authority of Mr Elliott should be considered as not valuable?

Mr Carter. — We totally distrust him, and have carefully avoided him. He is a great favourite on the other side.

Sir Charles Russell. — As a learned Judge once said, it sometimes happens that a witness who is called for the plaintiff turns out to be a very

valuable witness for the defendant; therefore the plaintiff naturally distrusts him.

Mr Foster. — We have not called him as a witness.

The President. — Do you say he was recalled by the Government? Is that your remark?

Mr Foster. — I say we have not called him as a witness.

Sir Charles Russell. — No, you have not; and that induces me to say what I thought was beyond dispute. You constituted him a special commissioner by Act of Congress in 1890, and you clothed him with a special authority, as the best person you could select for the purpose of enquiring into this very question, *after it had arisen* in controversy between Great Britain and America; and because his results do not suit the argument or the purposes of my learned friends, then he is rejected, and his evidence discarded.

Mr Carter. — The reason of it is another thing.

The President. — Is it a reason which you can state?

Mr Carter. — Our interruption was founded solely upon this : Sir Charles sought to impute him to us. We reject him. That is all.

The President. — What I took the liberty of asking you was whether you distrust him as a bad observer, or for another reason, a reason which might make his observations suspicious.

Mr Carter. — Oh, we distrust him because we suppose that he is an untrustworthy observer — a man who is given to theories, and not to an accurate dealing with facts. It is on this ground that we distrust him. He is not a man from whom we conceive the truth can be well and suitably gathered.

The President. — I believe there were some contradictions, were there not, in his observations at different periods?

Mr Carter. — We think a great many. Mr Phelps will probably have something to say about him.

The President. — Very well.

Sir Charles Russell. — I would dismiss this subject in a word. I only intended to make a passing reference to it. If there is anything to be said about this gentleman, let it be said by members of the Tribunal, or let it be said by my learned friends, so that we may know what it is; because I find myself in a very strange position in regard to him. I find this gentleman, not once, but twice, instructed to report officially for the United States Government. The document which I was about to refer to is an *official document* printed by the Government Department at Washington in 1874, and it appears in the Tenth Census Report of the United States. I find that it was reprinted, in 1881. I find that in 1890 the author is appointed to report by an Act of Congress, which I have got here if there is any doubt about it.

Mr Carter. — None of those things are questioned. It is not the first time the United States has had an objectionable man in its employment.

Sir Charles Russell. — Very well. He is objectionable because his evidence does not suit your purpose.

Mr Carter. — We will discuss that hereafter.

Sir Charles Russell. — Now finally, we have got Mr Charles J. Goff, the Treasury Agent, in charge of the seal islands, writing on the 31st of July, 1890, “ There is but one authority upon seal life, especially the seals of the Pribilof Islands, and this is the work of Prof. H. W. Elliott, who surveyed these rookeries in 1872 and 1874, and his work was verified by Lieutenant Maynard, and I am satisfied was as near correct when made as was possible for a man to make; but to-day there is a marked contrast between the conditions of now and then.” That was as late as July 1890. All I was going to say — it was really very innocent matter —

Mr Carter. — Except that you imputed him to us. That is all we object to.

The President. — I think it is clear that you do not trust him. Sir Charles trusts him. Well, we have to decide.

Sir Charles Russell. — I merely asked you, Sir, to take a note of the page. I was not even going to trouble to read it. It is on page 127 of the Report, which is in my hands, in which he refers to the industry of collecting the eggs of these wild birds as being an important one, upon these very islands : I was merely referring to it as an illustration of the theme I am upon, the rights which are attached to an industry.

Now precisely the same argument which has been advanced in respect of this industry of seal-skinning would apply to this industry of collecting eggs.

Or again, take the case of a game preserver, and there are such in England, who does not preserve game merely for the sake of shooting the game, but who makes a *trade* of preserving game. They shoot the birds and thereby they get sport out of them; but they send their game regularly to market, making the best profit they can out of their business. I have already dwelt upon how much greater care and expense and cultivation, or, to use an expression dear to my learned friends, how much more “ cherishing ” the action of the game preserver in the matter of pheasants is than it is possible for the action of the United States or their lessees to be; how the game preserver takes the eggs away from the nest to induce the bird to lay more than it otherwise would; how he places them under an ordinary fowl, and in that way rears them; how he feeds them and keeps them until they grow up, and he kills them; and yet when the birds go off his land upon the land of another, has it ever been heard, could it even be suggested, that this industry of sending his pheasants to market was injured in point of law because his unneighbourly neighbours in the open common adjoining waited until his birds escaped from his land, or were on the way back to it, and shot them there, thereby lessening his profits? The cases are absolutely analogous, but the case of the pheasants is much stronger.

Take again the case of a rabbit warren. A great many rabbits are

imported from this country into England. They are cultivated as an article of commerce. They are also cultivated in England as an article of commerce. There are such things as rabbit farms where everything is given up to the rabbits, and they are sent to the market as regularly as you send barn-door fowls to market, or as you send eggs to market, or butter to market, or any other article of farm produce. Is it to be said that when these rabbits leave the land of the man where they are in the habit of burrowing, and go on the adjoining open common or into another man's land, and are shot, and thereby his chances of shooting them in his own warren are diminished, and thereby the volume of his business are diminished, — is it to be said that that gives him a right of action? No.

These are apposite illustrations which, always bearing in mind that the absence of property in the animals is the hypothesis on which the argument of property in the industry is based, show how fallacious that argument is.

The President. — Would you say that in the case of the Earl of Abergavenny, which you mentioned yesterday, if the deer had been shot out of his park, it would have been lawful?

Sir Charles Russell. — No; because the jury found that the deer were tame. That is the difference. If there be any doubt about that, I will refer to it.

The President. — Oh no.

Sir Charles Russell. — The jury found that the deer were tame; and of course I took it for granted that that point was present to the mind of the Tribunal. I am arguing this question upon the assumption that the seals are *feræ naturæ*; that is the assumption upon which my learned friend Mr Phelps rests.

The President. — Would you consider the rabbits in the rabbit farms you spoke of as wild rabbits, as *feræ naturæ*?

Sir Charles Russell. — They are so considered. I have never known any allegation of property in rabbits except in the case of tame rabbits, raised in hutches.

The President. — In France, you know, we cultivate tame rabbits.

Sir Charles Russell. — In hutches you mean?

The President. — Yes in hutches. That is another thing?

Sir Charles Russell. — That is a different thing altogether: I was not of course dealing with that case.

But on this point I hope I am followed by the Tribunal: I read the argument so that there should be no mistake about it. The proposition which my learned friend advanced assumes that the animals are *feræ naturæ*. Let me read it again, in order to make my ground clear.

The President. — Perhaps it is best to read it again.

Sir Charles Russell. — It is on page 136:

The case of the United States has thus far proceeded upon the ground of a national property in the seal herd itself. Let it now be assumed, for the purposes of the argument, that no such right of property is to be admitted, and that the seals are

to be regarded outside of territorial waters as *feræ naturæ*, in the full sense of that term.

I have been arguing, of course, upon the assumption of this proposition.

The President. — That is an assumption. That is not the general statement of the United States.

Sir Charles Russell. — No, Sir.

The President. — It is an assumption merely for the sake of argument.

Sir Charles Russell. — May I point out that I have been endeavouring, I thought, with the closest attention to the order of the points, to follow out this assumption. I have argued, first, the question whether there was a right of property, and in discussing this question, I endeavored to establish — I hoped I had established — that seals were *feræ naturæ*. I had passed away from that, and I had therefore assumed as the datum of this part of the discussion, as Mr Phelps logically assumes, that they are *feræ naturæ*. His position is that, assuming them to be *feræ naturæ*, assuming no property in the seals or in the herd, yet that there is a property in the industry; that is the point I am now arguing.

The President. — There is no misconception about that.

Sir Charles Russell. — No, Sir. Now, Sir, I have said all I have to say upon those general illustrations of the fallacy of this proposition.

The Tribunal here adjourned for a short time.

Sir Charles Russell. — Mr President, recurring to the proposition which I said at the commencement of my argument on this point must be established by my learned friends, I have now to submit that that proposition has not been and cannot be established. That proposition is that what must be shown is, that pelagic sealing is an invasion of a legal right attaching to the industry. I have dwelt at some length upon the matter, because of the respect that I unfeignedly feel for anything my learned friend Mr Phelps feels justified in gravely advancing; but I have finally to say, first of all, that I find no authority either in municipal law or in international precedent to warrant the claim that is here made; secondly, that I have pointed out by the illustrations that I have given, that if any such idea were to be accepted, novel as I submit it is, it certainly would apply to many other cases; and, when it is remembered that there is no property right in the thing or no exclusive right to take the thing, it would have a far-reaching importance.

There are two other subjects that were referred to incidentally in some observations which fell from you, Sir, as to certain rights, which might be

likened to industrial rights, which had not a tangible existence, but which might be considered in the nature of property or property right, and the special illustration that you gave was in relation to copyright. Now I think that that was perhaps a reference not without its use, because it does present an illustration of a case in which

Copy and patent right.

there exist in the popular, ordinary acceptation of the phrase, natural rights of property which may take the form of a useful invention for the benefit of the world, or of a creation of the brain, either in the shape of works of imagination, the result of long labour and research, or works of history or science, or may take the shape of inventions to lessen labour and advance in that way processes useful to mankind — and would suggest that, in the case of the individuals, they were eminently deserving of protection and recognition; and, taking the productions of a nation in the aggregate, might well be said, without any extravagance of language, to constitute a national property or a national interest, speaking in popular language. Yet what is the fact in relation to both those subjects of copyright or patent right? I said a day or two ago that some English judges had declared that our earliest Statutes upon the subject of copyright were but an affirmance of a principle which was embodied in the Common Law. That has not been generally accepted. The earliest of our Statutes dates back to the time of Queen Anne. But though those opinions have been entertained by some Judges as to the existence of at common law right of protection to copyright, certainly they were not generally held, and certainly they were not views that were ever held to have any operation in the sense of establishing property outside the municipal law of England. I think the law of France is the same. I do not know any country which has protection except by comparatively recent legislation either for copyright or for invention. I do not think there is any trace of it — and I speak subject to the correction of the eminent Jurists I am addressing — in the earlier systems of law, especially the Roman law.

The President. — The first trace in France was in the form of a royal license for printing.

Sir Charles Russell. — Quite so. Now I will state what the condition of things is internationally upon both these subjects. A good many of the civilized Powers have by international arrangement — I use international arrangement as distinguished from international law — sought to bring their mutual relations on the subject into consonance with municipal law.

Now, first as to copyright. One of the earliest International Conventions to which Great Britain was a party dealing with copyright was as recent as the year 1886; and up to that time it had been a matter of great complaint, as regards many foreign countries, on the part of English authors that their books were re-published under circumstances which gave them no reward whatever for their labour. And great complaints were made, especially of one great English-speaking community, — I mean, of America, though it also had its complaints, and well-founded complaints, which I shall presently refer to — but one great complaint was that in America English books were reproduced, and the profit of their reproduction went into the pocket not of the original author, but into entirely different channels; and

to the general Convention I am about to refer to, America was no party. The part the United States of America played in the matter I will mention later; but, in 1886, Great Britain, Germany, France, Italy, Spain, Portugal, Belgium, Switzerland, Hayti and Tunis were parties to the International Copyright Convention of that year; and, under that Convention, authors of any of the countries, parties thereto or representatives of those authors, enjoy in the other countries for their works, whether published in one of those countries or not, the rights which the respective laws of those countries, either then or thereafter, give to the nationals of the particular country.

The enjoyment of these rights is made subject by the Convention to compliance with the conditions and formalities prescribed by the law of the country of origin of the work, and does not extend in other countries beyond the terms of protection granted in the country of origin. As I have said, the United States was not a party to this Convention; but quite recently, I think in 1891, the United States passed a law granting security of copyright in the United States to the authors of any country which gives copyright to the productions of the citizens of the United States on the same terms as it gives protection to its own nationals in respect of any work printed and published first or, at least, simultaneously, in the United States; and, upon an official intimation from the Government of Great Britain that Great Britain in fact gives copyright protection to United States' citizens on the same terms as she does by her law to British subjects, the President, under the authority of the law of the United States, may issue a Proclamation extending the benefits of the Act to British subjects.

Senator Morgan. — Will you permit me to say that that Act of Congress was based upon the fact that the Constitution of the United States creates property in intellectual productions and also in inventions. It *creates* property.

Sir Charles Russell. — That is my point. My point is, that while it creates or recognizes that for its own citizens and nationals, it did not recognise that property when it was the creation of British law.

Senator Morgan. — It might have been so in practice; nevertheless, the Government of the United States assumed the right in virtue of its sovereignty to create property in intellectual productions and also in inventions, just as if they were material substances.

Sir Charles Russell. — I assure you, Sir, I am not concerned to dispute that. I began by saying that the Copyright Act of Queen Anne was, by some of our Judges, supposed to be an assertion of a common law principle, which would be a recognition of property. The point I am upon, the learned Senator will see, is that, while municipally regarded there was property, there was no international recognition of that property.

Senator Morgan. — That depends on international considerations; but the fact of property in intellectual efforts and productions, and property

in inventions, was established by the Constitution of the United States.

Sir Charles Russell. — I do not doubt it. I have said the fact was so as regards Great Britain. That is not the point I am upon. The point I am upon is that it was not internationally so regarded; namely, that the author producing an important work in England, the result of the labour of years or of a lifetime, had that work reproduced, pirated, in the United States and other countries. Do not let the learned Senator suppose I go into it for the purpose of recrimination, or anything of that kind, because I certainly do not. I only seek to show that internationally the property was not regarded, and that this Convention does not make international law; it is a step towards international law, but it does not make it. It is simply an agreement binding upon the Powers who are parties to it, and carrying with it an obligation upon the part of those Powers to take the necessary steps to give effect to it.

Now as regards inventions the United States, on the other hand, had very serious ground of complaint. The United States has added greatly to the wealth of the world in that field of invention especially which tends to the simplification of processes of labour, to which invention the spur had been given largely owing no doubt to the absence of a dense population to supply the full demands for manual labour. The state of the English law in that regard is this: Prior to 1883 it had been for many years the law in England that the person who introduced into the United Kingdom for the first time a new invention, whether it was his own invention or not, was considered the first and true inventor. I think I am right in saying that the same was the law in the United States of America, as regards inventions of other countries. The result was that many inventions created in America, when they became known there, were communicated by telegram or by post to Great Britain, and in Great Britain they were registered and patented: provisional specifications were filed, and so forth, and the person who so specified it, and patented it, although he might not have been the producer of the idea, and often was not, was, according to English law, the “first and true inventor”.

This difficulty formed the subject of frequent discussions, and ultimately a convention was signed in Paris on the 20th March 1883, to which, in the first instance, Belgium, Brazil, Spain, France, Guatemala, Italy, and Portugal, amongst others, were parties: by which it was agreed in Article 4 that any person who had duly applied for a patent, design, or trade mark, in one of the contracting States should for a period of six months, and in some cases for a longer period, have the priority to the right of application for the patent or trade-mark in any of the other countries parties to the convention. The actual terms of the original convention were subsequently modified but not in any material respect upon this point. The United States subsequently joined in the convention, and thereby, in common with the other contracting countries,

established a rule for the protection of designs, trade marks, and letters patent, which were called industrial property. Prior to this convention, and apart from the countries that are parties to it, no right of property in letters patent was recognized as between nations at all; and the law at this moment stands in this way, that though the concurrence of the most conspicuous Powers of the world goes a long way towards a general international copyright law and a general law in relation to patents, still, the law which affects internationally these two important subjects of copyright and of invention, rests solely upon the agreement embodied in the convention, and is binding solely on the parties to it.

Senator Morgan. — That would become international law if we wait long enough and nobody objects.

Sir Charles Russell. — In process of time I sincerely hope it will.

Now Mr President, the next branch of the argument that my learned friend Mr Phelps proceeds to is the consideration of the question, assuming that he has established an industry which he says is injuriously affected by something done, what by international law are the rights which a Power in time of peace may exercise for the protection of that right, or of that industry.

Examination of the argument as to the right of protection.

Now, of course, Mr President, it is obvious that if I have succeeded in establishing that there is no right to protect, it becomes quite unnecessary to consider what are the rights of protection. I certainly should be quite content to leave the argument at this stage resting upon the ground that no right has been shown to exist, and therefore, where there is no right to protect, it becomes immaterial to consider what may or may not be done under international law, with a view to protection; but I do not wish to pass by in a contemptuous way any argument my learned friend has advanced; and I think it may throw some light on the general consideration of this question and upon the fallacies which, I conceive, creep into this part of the case, if I call attention to the cases which my learned friend has cited in support of this supposed right of protection in time of peace, and the acts which may by international law be done in defence of that right.

But first, and in order that the Tribunal may, when I am calling attention to these cases, appreciate the distinction which I make in reference to them, and the criticism which I shall take the liberty of addressing in reference to them, I should like to be permitted to point out in general language what I submit are the fallacies of the arguments based upon them. The fundamental fallacy in this connection is found in the proposition advanced in the Argument of the United States that a State has in time of peace a right under international law, and in its full rights of self defence and self-preservation, to do on the high seas whatever it may conceive to be necessary to protect its property or its interests. That I conceive to be an unsound proposition. It makes the rights in time of peace the same as the rights in time of war. It confuses, I conceive, a

variety of actions upon the part of States, and treats them as if they were all of the same character, to be explained and to be defended upon the same grounds, although, in fact, as I have to submit, they are different in character and are defensible or are explicable by very various reasons.

It will be found that in these illustrations my learned friend, as I submit, has confounded acts done in a state of belligerency with acts done in time of peace, and confounded acts which a nation *will* do in defence of what it conceives to be its interest with what it *may* legally do under the sanction of international law. Now, still speaking generally, I would ask to be allowed, without referring for the moment to text books, which I shall do hereafter, to state generally the view which we desire to present upon this subject. I think, it will help to clear the ground, and to make the subject more intelligible, if we consider the case in which the rights of self-protection and defence, or self-preservation as they are called, are recognized by international law, and the grounds on which that recognition is based.

Now, by far the greatest number of instances apply to the state of belligerency, yet even here there are very strict rules. It will be recollected that belligerent rights rest on the genuine emergency of danger, which is the true basis of all exceptional acts of self-defence, or of self-preservation, and upon the consent which in consideration of that danger is given by neutral States. But even in the state of belligerency, and as to belligerent rights, there are very clear limitations. Take the case of contraband of war. The law of contraband of war does not extend to every commodity which a belligerent Power may choose to declare contraband : and, therefore, if something which international law does not recognize as contraband of war is seized by a belligerent, and brought into a Prize Court for condemnation, although the belligerent might have been morally justified, according to its view of the emergency at the moment, in seizing that particular thing, a Prize Court could not condemn it, according to international law, unless it fulfilled the conditions which are recognized by international law as being essential to contraband.

Again, take the case of blockade. There was an attempt in years gone by to establish what was known as paper blockade, but that is not recognized by international law. A blockade, according to existing international law, in order to carry with it the subsequent sanctions for attempts to break it, must be an effective blockade. And if a ship is seized by a belligerent Power, the International Prize Court would have to consider whether or not the condition of blockade existed which justified the seizure of a particular vessel as attempting to run that blockade. Again, the belligerent Power might have thought itself justified in doing it on moral grounds ; but, still, invoking international law, it could not get a condemnation in a Prize Court unless it was shown that the offence had been committed contrary to the canons of international law.

The nation might consider itself justified in seizing the ship going to run the blockade, though the blockade was not effective, — though the international conditions were not complied with; but it does so at its own risk. It does so at the risk of having to defend itself; and it does so with the consequence that, if it invokes the aid of an international Tribunal to condemn that ship, it cannot invoke it successfully. The nation seizes because it is thought the occasion justified it; because it is important that it should be done; but it is not a thing which, by international law, they are justified in doing.

Now, there is a good illustration of the distinction between what a nation *will* do and what a nation *may legally* do, in the well-known case of the “Trent”, which occurred at the time when the United States was engaged in the great struggle of its Civil War. I would like to remind the Tribunal of what the circumstances of that case were. Certain gentlemen, among others a Mr Mason and a Mr Slidell, were on board the “Trent”. These gentlemen were on board a neutral ship, an English ship, carrying the mails, not however that that gave any particular importance to it. They were bound on a mission to Europe, I think to England and France, to seek the aid of those Powers in their attempted revolt against the Federal Government of the United States. The “Trent” was seized, and possession of these gentlemen taken by the authority of the United States; and I have before me the Parliamentary Papers, which set out the whole of the correspondence in relation to this matter. The whole of it I do not intend, as you will conjecture, to trouble the Tribunal with; but what I do wish to call attention to is the position taken up by the United States’ Minister Mr Seward. He argues at very great length that these gentlemen might be treated as contraband of war; they were not soldiers, they were not carrying arms, but that nevertheless they might be treated as contraband of war. But that subject being treated by him at very great length in a despatch of the 26th of December, 1861, which extends to a great many pages, he finally, upon the remonstrances of Lord John Russell (who was then Foreign Secretary of Great Britain), feeling that he could not defend his position upon any international legal principle, agrees to release the men; and he adds that, as to this release, he does it the more willingly because he says all danger which might arise from their not being further detained had practically passed away.

To make this clear, I must go back a little. On the 9th of November, 1861, the announcement of the seizure is made; and Lord John Russell writes to the British representative at Washington on the 30th of November, 1861, announcing that intelligence of a very grave nature had reached Her Majesty’s Government; and he proceeds to mention the facts, and he concludes by making a demand for the release of the men: he says: —

It thus appears that certain individuals have been forcibly taken from on board a British vessel, the ship of a neutral Power, while such vessel was pursuing a

lawful and innocent voyage, an act of violence which was an affront to the British flag and a violation of international law.

Her Majesty's Government, bearing in mind the friendly relations which have long subsisted between Great Britain and the United States, are willing to believe that the United States' naval officer who committed this aggression was not acting in compliance with any authority from his Government, or that if he conceived himself to be so authorised, he greatly misunderstood the instructions which he had received.

For the Government of the United States must be fully aware that the British Government could not allow such an affront to the national honour to pass without full reparation, and Her Majesty's Government are unwilling to believe that it could be the deliberate intention of the Government of the United States unnecessarily to force into discussion between the two Governments a question of so grave a character, and with regard to which the whole British nation would be sure to entertain such unanimity of feeling.

Her Majesty's Government, therefore, trust that when this matter shall have been brought under the consideration of the Government of the United States, that Government will, of its own accord, offer to the British Government such redress as alone would satisfy the British nation, namely, the liberation of the four gentlemen, and their delivery to your Lordship, in order that they may again be placed under British protection, and a suitable apology for the aggression which has been committed.

Then a communication of the facts was at the same time made to the French representative by some of the persons taken on board this vessel, two, I think, being French subjects; and Mr Thouvenel writing to M. Mercier a communication which is afterwards communicated to Lord Russell, takes the same ground of its being an offence against international law. I need not trouble to read that.

Then follows, also, a communication from the Austrian Minister in the same sense as that from the French Minister. Also one from the German Minister, Count Bernstorff, to Baron Gerolt in the same sense.

Then comes the long communication from Mr Seward to which I have already referred, but with which I do not think I need trouble you at length. He argues the question out; tries to suggest that these men might be regarded as contraband of war; points out the difficulties of so regarding them, and makes the best answer he can. That claim to treat them as contraband of war he afterwards withdraws; and, finally, when he writes, announcing the release of the men, he says that if the safety of the Union required the detention of the captured persons, it would be the right and duty of the Government to detain them. "*The right and duty*", you will observe is the language used. "Right" is one of those words very often ambiguously employed. This correspondence demonstrates there was no right to seize or detain them by international law; and when Mr Seward used the word "right" in that connection, he meant what I have already adverted to — that it was something which *would be done, right or wrong*, whether internationally defensible or not, if the emergency of the situation and the interests of the United States required that it should be done.

Now Lord Russell replies to that despatch on the 23rd January 1863

(I am reading from page 37 of this correspondence) in these words.

Mr Seward asserts that "if the safety of this Union required the detention of the captured persons it would be the right and duty of this Government to detain them." He proceeds to say that the waning proportions of the insurrection, and the comparative unimportance of the captured persons themselves, forbid him from resorting to that defence. Mr Seward does not here assert any right founded on international law, however inconvenient or irritating to neutral nations; he entirely loses sight of the vast difference which exists between the exercise of an extreme right and the commission of an unquestionable wrong. His frankness compels me to be equally open, and to inform him that Great Britain could not have submitted to the perpetration of that wrong, however flourishing might have been the insurrection in the South, and however important the persons captured might have been.

My object in reterring to this case, Mr President, as I hope you will perceive, is to point to it as an illustration of the case in which a nation puts itself outside international right, and where the only defence of its position must be that it considers itself morally justified in doing the thing, and is prepared, if necessary, to fight in defence of having done it. That is not within the domain of international law, it lies entirely outside.

Again, take the case of the Revenue Laws — the Hovering Acts, which are referred to in the argument, as if they afforded some justification for the position of the United States as to self defence or self preservation. Upon what principle do those Acts rest? On the principle that no civilized State will encourage offences against the laws of another State the justice of which laws it recognizes. It willingly allows a foreign State to take reasonable measures of prevention within a moderate distance even outside territorial waters; but all these offences, and all offences of the same class and character relating to revenue and to trade, are measures directed against a breach of the law contemplated to be consummated within the territory, to the prevention of an offence against the municipal law within the area to which the municipal law properly extends. But it does not follow that all Acts of this kind will in all cases meet with assent. It certainly would not, and could not be expected to meet with assent, if the right were attempted to be exercised — I use the word "right" in the laxer sense of the word: I would prefer to say "if the Acts were attempted to be enforced", — at a considerable distance from land, and I affirm that in no such case by international law, could it be maintained as of right against an objecting nation.

As was said in the case my friend referred to in his *Argument of Church v. Hubbard*, by Chief Justice Marshall, if the right is extended too far, it will be resisted; in other words, he considers that it is a quasi-right exercised by concession, and depending for its continued existence upon consent and upon the moderation with which it is used. And, indeed, as I read my friend Mr Phelps' argument upon this point, he seems to admit that that is the true view; because on pages 170 and 171 my friend

dealing with one of the contentions advanced on the part of Great Britain, says :

An effort is made in the British Counter Case to diminish the force of the various statutes, regulations and decrees above cited, by the suggestion that they only take effect within the municipal jurisdiction of the countries where they are promulgated, and upon the citizens of those countries outside the territorial limits of such jurisdiction.

Then my friend proceeds :

In their strictly legal character as statutes, this is true. No authority need have been produced on that point. But the distinction has already been pointed out, which attends the operation of such enactments for such purposes. Within the territory where they prevail, and upon its subjects, they are binding as statutes, whether reasonable and necessary or not.

That is true : Then he goes on to say “ without ”, that is to say, outside the territory :

Without, they become defensive regulations, which if they are reasonable and necessary for the defense of a national interest or right, will be submitted to by other nations, and if not, may be enforced by the government at its discretion.

You see, Mr President, once you criticize and appreciate the language in which this is stated (which is in strict conformity with *Church v. Hubbard*), you will see my friend is there referring to exactly the principle of the Hovering Acts, about which I shall have something to say in a moment, that he is referring to something, not which the nation has a legal right to do by a recognized rule of International law, but to something which, so long as it is reasonable and necessary, “ *will be submitted to* by other nations, and, if not, may be enforced by the Government at its discretion. ”

I need not say, therefore, that my friend's proposition consists of two branches — first of all, that a defensive regulation which is reasonable and necessary will be submitted to; secondly, that if it is not submitted to, the nation has, in order to compel assent, the resort to force alone — which is war. But I would like to say one thing, as I have drawn attention to this, although it is not strictly to the point upon which I am, but it is nevertheless sufficiently *ad rem* to justify my now alluding to it. You will observe that in this paragraph my friend Mr Phelps has recognized that the *territory* is the limit within which a municipal statute operates; and, therefore, he provides for the case of the United States failing to establish territorial dominion, or territory over the area to which their statutes have been adjudged to apply, and he is in effect saying that, although *quod* statute it has no operation outside the territory, yet failing operation outside the territory it becomes a good, effective, defensive regulation.

Now I have, upon that, to make two observations. I have to ask in the first place : Is there any precedent in any book of authority or in any international controversy in which a statute assuming to exercise authority

over a territorial area has ever been regarded as a protective or self-defensive regulation? That is the first question to which I would invite, when the proper time comes, my learned friend's answer — Is there any such case? Nay, I will suggest further that the very idea of defensive regulation, or defensive act, or self-preservative act, repels the idea of cut and dried, formulated rules? The occasions for acts of self-defence, or self-preservation, are occasions of emergency — sudden emergency — occasions when there is no time (to use the expressive language of an eminent Statesman of the United States, to which I shall hereafter refer), — when there is no time for deliberation, no time for contrivance, no time for warning, no time for diplomatic expostulation. That is the very idea at the bottom of all these exceptional acts of self-defence or self-preservation. But to say that a statute which fixes its own penalties, including imprisonment, and which is applied and intended to apply territorially, that is, within the dominion, is to be regarded, when the occasion of the State requires the argument to be turned that way, as a defensive regulation applicable to the case of emergency, or falling within the principle of acts of self-preservation, is, as far as I know, entirely and absolutely without any kind of authority.

Besides, let me remind you of a further difficulty, as I have touched upon this point. The very constitution of an international Court implies that there is a question to be settled upon international principles — upon the principle that the Court is not the Court of the captor only, but a Court which is charged with the care of, and the just adjudication upon, matters affecting the rights of all nations, entirely and wholly apart from the municipal law; and one of the first things which the Judge of such a court would be called upon to consider would be the circumstances of the case, the character of the emergency, and the character of the sanction which by international law would follow upon the act done if it were not justified by the circumstances of the case. But here is a cut and dried statute, which tells the Judge that the consequences of the act on which he has to adjudicate are confiscation of the ship, imprisonment of the men — imprisonment not exceeding a definite term — or imposition of a fine not exceeding a definite amount. This argument of self-defensive regulation is an ingenious afterthought: creditable to the subtlety of the minds which have invented it, but not a defence which was present to their minds when this question was diplomatically in controversy between Great Britain and the United States.

I have been drawn a little away, Mr President, from the point which I was upon, although I think what I have said is still quite necessary to the line of the argument which I am pursuing.

I have already referred, Mr. President, to this question of the Hovering Acts, and I do not intend to repeat myself upon them except to make this comment: that — although many Powers have adopted Acts which may be called Hovering Acts, and although other States, especially those that have similar Acts, have recognized, have not complained of, have ac-

quiesced in, acts done outside the territorial limits in defence of trade or revenue, acts done by other Powers under those Acts even where they involve the seizure of their own ships and subjects — yet I think it would be too much to say, even at the present day, that the principle of the Hovering Acts can properly yet be said to be part of international law : it really does rest now upon that principle of acquiescence which I have mentioned, and that acquiescence in its turn rests upon the principle that a nation will not interfere to throw the mantle of its protection over one of its nationals when that national has, for his own private ends, been running counter to a just and reasonable law of a friendly Power.

And I observe that that is the way in which these Hovering Acts are treated by text writers of authority. I refer to Dana's edition of Wheaton, the 8th edition published in 1866, and especially to the note 108, following upon the beginning of section 180 ; but I will not read the passage for the moment.

Now I will still pursue the question raised, as to certain things which are done with permission and acquiescence, whether or not they may be said to be strictly conformable to international law.

Take again the pursuit of vessels out of the territorial waters, but which have committed an offence against municipal law within territorial waters — which is a case which my learned friend and myself (and I have no doubt my learned friends on the other side), have had frequent occasion to consider. Here, again, there is a general consent on the part of nations to the action of a State pursuing a vessel under such circumstances, out of its territorial waters and on to the high sea.

Senator Morgan. — You mean a consent by acquiescence?

Sir Charles Russell. — A consent by acquiescence.

The President. — And not in every case?

Sir Charles Russell. — No, certainly not in every case. I will state — although not perhaps exhaustively — some of the leading conditions. For instance, one condition is it must be a *hot* pursuit — that is to say, a nation cannot lie by for days or weeks and then say : “ You, weeks ago, committed an offence within the waters, we will follow you for miles, or hundreds of miles, and pursue you ”. As to that, it must be a *hot* pursuit, it must be *immediate*, and it must be *within limits of moderation*. In other words, we are still considering the character of the act which is not defined by International law, which is not a strict right by International law, but which is something which nations will stand by and see done, and not interpose if they think that the particular person has been endeavouring to commit a fraud against the laws of a friendly Power.

Senator Morgan. — That relates to the morality of the act.

Sir Charles Russell. — To some extent, undoubtedly. The particular nation would undoubtedly be guided in its acquiescence or non-acquiescence according to its view of the morality or immorality of the particular conduct pursued — according to its view of the justice or injustice, reasonableness or unreasonableness, of the particular law.

I am of course here endeavouring to show that these various cases, quite dissimilar in their character, but all grouped together by my learned friend, are explicable upon different reasons. Some of the instances in the later cases which he gives, to which I am going to refer, are cases that fall within an entirely different category. They are acts either quasi-belligerent or actually belligerent, and fall within no rule of international law at all; they are acts which the nation does at its peril, taking the risk of having to defend them by force if they are challenged. They do not fall within any (what I may call) peace principle of international law.

Then again, take the case of sudden emergency, where there is something that may properly be considered as requiring instant action; as, for instance, those which are given by Azuni, where to avoid a greater danger, for example, the spread of fire, you may even destroy the property of another under the urgent necessity of the moment, where there is no time for precautionary measures, and the spread of the fire must be prevented: there you may act on the instant though by your act you destroy the property or invade the right of another. The case rests upon an entirely different principle.

But as regards those cases, as Mr Webster, the American Minister, said in the case to which I shall presently refer, what a Government in such a case has to do in defending or excusing an act which is an invasion of the rights of another sovereign Power, is to “ show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation. ”

That is the language of one of the most distinguished of the Ministers of the great American community.

Now in time of peace it will be found that the liberty conceded by consent of nations to maritime Powers as to exceptional acts of self-preservation is very closely restricted indeed; and here the simple inquiry is, how far can it be shown that civilized States have agreed to the exercise of a jurisdiction on the high sea under the plea of self-defence or of self-preservation.

And I submit that it has never been suggested, still less agreed to by nations, that a particular Power may judge for itself of the inconvenience it is suffering from the action of another Power on the high seas, and put down that action with a high hand. Any such general proposition is unsound. It may do it; but if it does it it does it as an act which it must defend by force if challenged; it is not in the exercise of a legal right. It is a resort to the early sanction of force, and must be justified, if it be necessary, by force. And the restricted proposition which we state, and by which we stand, is, that in such a case as the present, where there was *no* such instant overwhelming necessity of self-defence, where there *was* time for device of means, where there *was* time for deliberation, where there *was* time for diplomatic expostulation and representation, that it is idle to try to treat this case as a case of necessary self-defence or self-preser-

tion. For be it recollected that beyond the fact of the legislation, which was professedly a territorial legislation, and a territorial legislation only : and beyond the fact of the seizures, which were made upon the basis of the assertion of that territorial legislation, there was, before these seizures began, no representation made to Great Britain by the United States that she regarded this as a matter of national interest by which, right or wrong, they were determined to stand. And up to the present time even there has been no such representation.

Their case has been based upon alleged right, and based upon right mainly and primarily upon the ground of extended territorial jurisdiction over the waters of Behring Sea. We say therefore the true proposition, the true limitation, in such cases, in times of peace, as between friendly Powers, is that there is no right by international law to seize the ships of another nation — I am excluding cases The true limit of self-defence in time of peace. within the Hovering Acts, which I have already dealt with — that in time of peace there is no right to seize the ships of another nation on the high seas except for piracy.

I may be asked, finally, may there not be cases in which, although it may not be possible to formulate the interests of a nation under any recognized head of law, municipally or internationally regarded : yet may there not be cases in which there may be great interests of a nation which yet call for and morally justify that nation in acting, and acting in assertion of those interests and in defence of them? Yes; there are such cases; but what are they? They are cases which rest upon the very same principle upon which nations have been driven, sometimes justly, sometimes unjustly, to defend territory which they have acquired, or to acquire territory in which they have by international law no right, but which, either in pursuit of a great ambition, or in the gratification of racial antipathy, or under the influence of the ambition of a great potentate, they choose to think is necessary for the well-being and safety of the nation. But that is not international law, or international right. That is war, and is defended as war, and justified as war alone.

And I do not hesitate, Mr President, to follow out this illustration to its conclusion. I do not hesitate to take the concrete case of these seals. It would be remarkable if they did it, they would be very unwise if they did it — extremely foolish if they did it — if I may respectfully say so. But the United States might choose to say : — We regard the interests of fur-sealing as of so great a magnitude, as of so much importance to the well-being of our great community, as so important to the advancing interests of civilization the world over, that we will assert, right or wrong, our claim against the world to protect the fur-seals in Behring Sea, or miles away from the Behring Sea.

But that would be war.

And there is another side to the question. Great Britain might choose to say : — We consider the interests involved in this question as very

great and very important — not merely to the interests of the Canadians, to the interests of a rising colony; but in view of the broader and greater principle which we conceive to be involved, the interference with the equality of all nations on the high sea, the attempt by one nation to usurp special privileges and special powers on the high sea. We consider that question to be of so great importance that we will defend it by force.

But that again is war.

That is not international law; that is not international right; and that is not the character of the question which this Tribunal has been invoked to determine. In this at least we are agreed: that as regards these questions which I am discussing (I have nothing to do with regulations at this moment) as regards these questions of legal right, we are to address you as lawyers would address judges, as advocates would address jurists.

In view of, and after, this general statement upon this matter, I now ask your consideration of the authorities cited by my learned friend; and you will see that they fall within one or other of the categories to which I have adverted, and are not cases of acts of defence or in the nature of acts of self preservation, as suggested.

Examination of examples of acts of self-defence cited by United States.

The first of these is at page 152, the case of Amelia Island, which occurred in the year 1810. This will be found to have been in effect beligerency. These are the facts; and I take them as they are put in the printed Argument of the United States.

Amelia Island, at the mouth of St. Mary's river,

Which I may say is off what is now the State of Florida

and at that time in Spanish territory, was seized in 1817 by a band of buccaneers under the direction of an adventurer named McGregor, who, in the name of the insurgent colonies of Buenos Ayres and Venezuela, preyed indiscriminately on the commerce of Spain and of the United States. The Spanish Government not being able or willing to drive them off, and the nuisance being one which required immediate action, President Monroe called his Cabinet together in October, 1817, and directed that a vessel of war should proceed to the island and expel the marauders, destroying their works and vessels.

Why, the mere statement of the case, as it is put here — not unfairly at all — by my learned friends, shows what the character of the case was.

I have before me the message of the President of the United States to Congress, in which he explains and justifies the action that is referred to in that case; and having read that, I shall not need to say more about it. Of course if I am relieved, as I should be delighted to be relieved, of any of these cases by the Tribunal, I shall pass on.

The President. — Not at all.

Sir Charles Russell. — But I must deal with each of them unless I am so relieved.

This was the message of President Monroe, delivered on the 13th of January, 1818. He says :

I have the satisfaction to inform Congress that the establishment in Amelia Island has been suppressed, and without the effusion of blood.***By the suppression of this establishment and that of Galveston, which will soon follow, if it has not already ceased to exist, there is good cause to believe that the consummation of a project fraught with much injury to the United States has been prevented. When we consider the persons engaged in it, being adventurers from different countries, with very few, if any, of the native inhabitants of the Spanish colonies; — the territory on which the establishments were made, one on a portion of that claimed by the United States, westward of the Mississippi; the other on the part of East Florida, a province in negotiation between the United States and Spain; — the claim of their leader, as announced by his proclamation on taking possession of Amelia Island, comprising the whole of both the Floridas, without excepting that part of West Florida which is incorporated with the state of Louisiana; — their conduct while in the possession of the island, making it instrumental to every species of contraband, and in regard to the slaves, of the most odious and dangerous character; — it may fairly be concluded that if the enterprise had succeeded on the scale on which it was formed, much annoyance would have resulted from it to the United States.

Other circumstances were thought to be no less deserving of attention. The institution of a government by foreign adventurers in the island, distinct from the colonial governments of Buenos Ayres, Venezuela, or Mexico, pretending to sovereignty and exercising its highest offices, particularly in granting commissions to privateers, were acts which could not fail to draw after them the most serious consequences. It was the duty of the executive either to extend to this establishment all the advantages of that neutrality which the United States had proclaimed and have observed in favor of the colonies of Spain, who, by the strength of their population and resources had declared their independence, and were affording strong proof of their ability to maintain it, or of making the discrimination which circumstances required. Had the first course been pursued we should not only have sanctioned all the unlawful claims and practices of this pretended government in regard to the United States, but have countenanced a system of privateering in the Gulf of Mexico and elsewhere, the ill effects of which might and probably would be deeply and very extensively felt. The path of duty was plain, from the commencement; but it was painful to enter upon it while the obligation could be resisted. The law of 1811, lately abolished, and which it is therefore proper now to mention, was considered applicable to the case, from the moment that the proclamation of the chief of the enterprise was seen, and its obligation was daily increased by other considerations of high importance, already mentioned, which were deemed sufficiently strong in themselves to dictate the course which has been pursued.

Early intimations having been received of the dangerous purposes of these adventurers, timely precautions were taken by the establishment of a Force near the St. Mary's, to prevent their effect, or it is probable that it would have been more sensibly felt.

Then on the next page :

For these injuries, especially those proceeding from Amelia Island, Spain would be responsible, if it was not manifest that, although committed in the latter instance through her territory, she was utterly unable to prevent them. Her territory, however, ought not to be made instrumental through her inability to defend it to purposes so injurious to the United States. To a country over which she fails to maintain her authority, and which she permits to be converted to the annoyance of her neighbors, her jurisdiction for the time necessarily ceases to exist. The territory of Spain, will, nevertheless, be respected, so far as it may be done consistently with the essential interests and safety of the United States. In

expelling these adventurers from these posts, it was not intended to make any conquest from Spain, or to injure in any degree the cause of the colonies. Care will be taken that no part of the territory contemplated by the law of 1811 shall be occupied by a foreign Government of any kind.

You will see at once what the case was.

Lord Hannon. — Is not the substance of it this : There being no responsible Government to which recourse could be had for redress, direct war was made upon these people?

Sir Charles Russell. — Certainly; and they were adventurers, usurping authority in two places, part attached to American territory, part attached to the State of Louisiana, with regard to which they were in negotiation with Spain, at the very time, for the acquirement of the territory, and which they afterwards acquired. They were, if I may use that expression, land pirates.

Mr Justice Harlan. — Sir Charles, it may be worth stating that under the Constitution of the United States only Congress can declare war.

Sir Charles Russell. — That I had also recollected. It is important, undoubtedly, in that connection. I supposed it had declared war, though I do not know for certain.

Mr Justice Harlan. — I do not remember that it had.

Sir Charles Russell. — It did not treat this party as a real belligerent. It treated it rather as a case of land pirates.

The President. — It was rather an act of military execution than of belligerency, I should say.

Sir Charles Russell. — That may be so — quasi-belligerency, in point of fact, I suppose.

What I wish to point out is this. I am obliged to Mr Justice Harlan for reminding me of what I in fact knew, that the assent of Congress is necessary to the conclusion of a Treaty and to a declaration of war; but whether it was war formally declared or not, I wish to point out that my learned friends, in citing this case, have themselves treated it as belligerent, because the sentence on page 152, begins with these words : “ *A belligerent may* ” —

The President. — That is a quotation from Mr Wharton, I believe.

Mr Phelps. — All those quotations are from Mr Wharton. They should be in quotation marks.

Sir Charles Russell. — Very likely that is so. I accept it. What I am calling attention to is this :

A belligerent may under extreme necessity enter neutral territory and do what is actually necessary for protection.

And he cites the case of Amelia Island, in respect to which he says :

The President. — The last line is by Mr Phelps, but I believe the two preceding lines are not.

Mr Phelps. — Mr Wharton's proposition is the first one, beginning, Intrusion on the territory or territorial waters of a foreign state, etc.

Sir Charles Russell. — Then Mr Phelps, I think, agrees that these words are his.

A belligerent may, under extreme necessity, enter neutral territory and do what is actually necessary for protection.

Mr Justice Harlan. — Is that yours, Mr Phelps, or Mr Wharton's?

Mr Phelps. — Mr Wharton's.

Sir Charles Russell. — Are you quite sure, Mr Phelps?

Mr Phelps. — I am quite sure.

Sir Charles Russell. — It is enough then to say I have not the weight of the authority of my friend Mr Phelps; I have only the authority of Mr Wharton, and he treats it as a belligerent act. I am sorry I have not both; but I shall be content with one.

But whether war was formally declared or informally declared, the acts were in the nature of belligerent acts, directed to putting down the persons who were assuming, without authority, jurisdiction, and who were committing acts, as I have said, of land piracy. That is practically all that one can say of it.

The next case cited is the case of the *Caroline*, on page 153. That was a case where there was, or had recently been, an actual rebellion in Canada. What happened was this : It appears from the correspondence, which I shall presently refer to, that this vessel, the *Caroline*, was armed by a number of persons acting in sympathy with the rebellion. These persons got the vessel to the river which connects Lake Erie with Lake Ontario.

The flow of the water is from Lake Erie into Lake Ontario, and Lake Erie divides Canadian from United States territory. They got this vessel, intending to use it as an offensive weapon against Canada, into the river which unites Lake Erie with Lake Ontario, and they got to the side of the river next to American territory. In that condition of things the Canadian authorities sent down an armed force, took possession of the vessel, and being unable to take her away, they destroyed her as being an engine of offence directed against her. My friend Mr Box has been good enough to give me a short note which he has extracted from a parliamentary paper which I have here, and which I have read, but the note gives the facts. The case of the United States is set out in a despatch from Mr Stevenson to Lord Palmerston, dated the 22nd of May 1838.

According to this despatch, there was an insurrection in Canada. The *Caroline* was an unoffending United States vessel. She was seized in a United States port, set on fire, and sent over the falls of Niagara.

That is the statement of Mr Stevenson.

The British case, on the other hand, is set out in a despatch from Lord Palmerston to Mr Stevenson, dated the 22nd of August, 1841.

According to Lord Palmerston's account of the facts, a small band of Canadian refugees, who had taken shelter in the state of New York, formed a league with United States citizens for the purpose of invading British territory, not to aid in the civil war, which did not exist, as Lord Palmerston contended, but to commit in British territory robbery, arson and murder. At the United States port of Schlosser, with the connivance of the authorities there, the *Caroline* obtained munitions of war from the public stores, some of which were conveyed to Navy Island, in British territory, for the above uses. The British boat surprised the vessel in Schlosser harbor at night, removed the crew, set it on fire, and let it drift over the Falls. Mr Webster, who then was the Minister of State, writes in reference to this matter the language which I have quoted; at a later stage of the diplomatic discussion, and repeating his view of the facts, says:

Under those circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty's Government to show upon what state of facts and what rules of international law the destruction of the *Caroline* is to be defended. It will be for that Government to show a necessity of self defence, instant, over-whelming, leaving no choice of means and no moment for deliberation.

It is set out at page 186 of the printed Argument, in which this case is referred to.

I have only finally to read the justification which Lord Palmerston put forward for the act, with which explanation the United States was content, and did not pursue the matter further. The despatch from Lord Palmerston is dated the 27th August, 1841, and is set out at page 56 of the correspondence relating to this matter. He gives the statement and facts which I have endeavored to summarize.

The President. — We have not got that.

Sir Charles Russell. — No, I shall hand this to the Tribunal if they so desire it. It is upon a matter upon which there is no dispute as to fact. I am reading historical documents. Lord Palmerston goes on, after stating the facts very much as I have described them, and says:

In this state of things a small band of Canadian refugees, who had taken shelter in the State of New-York, formed a league with a number of citizens of the United States for the purpose of invading the British territory, not to join a party engaged in civil war, because civil war at that time in Canada there was none, but in order to commit within the British territory the crimes of robbery, arson, and murder.

Her Majesty's Government, and Her Majesty's Minister at Washington have called these people pirates, and the American secretary of State in a recent note to Mr Fox observes, that this name cannot properly be applied to them. The Undersigned is ready to admit that technically, the word "pirate" is applied to persons who, without authority or commission, commit upon the high seas the crimes which this band of offenders determined to commit upon the land; but if the term is in this case inappropriate, it is so, not on account of the nature of the acts which these men were about to perpetrate, but on account of the element on which those acts were to be committed —

And then he concludes:

That there was no fortification at Schlosser —

That is the place where the ship was seized.

Her Majesty's Government are ready to admit; for though the place is called Fort Schlosser, Her Majesty's Government believe that no fortified building at present exists there. It is also perfectly true that no hostilities had been commenced on the American side, if by that expression Mr Stevenson means the American side of the river; but that hostilities had been commenced by the Americans is now an historical fact, and those hostilities consisted in an invasion of British territory by an armed force from the state of New-York. In fact, the people of New-York had begun to make war against Her Majesty's Canadian Provinces. They had done so apparently with the connivance of the Authorities of the State; not only the New-York territory at Schlosser had lost its neutral character, and had become enemies' land, but other portions of the territory of that State had assumed the same condition.

One or other of two things must be. Either the Government of New-York knowingly and intentionally permitted the band of invaders to organize and equip themselves within the State, and to arm themselves for war against British territory, out of the military stores of the State; or else the State Government had lost its authority over the border districts; and those districts were for the moment in open defiance of the power of the State Government, as well as at war with the opposite British province.

In the first case the British Authorities in Canada had a right to retaliate war for war; in the second case they were no longer bound to respect as neutral that portion of territory which, by shaking off its obedience to a neutral Government, had ceased to be neutral, and could certainly not be entitled to the privilege of protecting persons who were actively engaged in making war upon Her Majesty's territory:

Whether that view was right, or whether it was wrong, I am only concerned in showing that the justification of the proceedings was a justification based upon a belligerent right, and as Lord Palmerston declared, it was an act of defence against an act of war; and it is enough to conclude this story to say that after some correspondence the authorities of the United States accepted that explanation, and did not press any claim for reparation.

Mr Phelps. — The correspondence on which this matter was concluded was between Mr Webster and Lord Ashburton, and was of a very different character from that.

Sir Charles Russell. — I do not think it is of an essentially different character from that. My learned friend is so courteous, that I am sure he would not make that observation unless he thought it was well founded. We have the correspondence of Lord Ashburton at page 186, and I do not admit that it differs in any sense. I do observe this, that Lord Ashburton takes up the language which Mr Webster formulates, and says that you have to show that the necessity for what you did was instant and overwhelming, leaving no choice of means, and no moment for deliberation; and Lord Ashburton proceeds to show that it came within that principle. But I am not aware that there is any other difference between them.

Mr Phelps. — The difference was not put upon the ground of being an act of war or of the United States having lost its character of neutral territory; but simply as an act of self-defence against a band of robbers.

Sir Charles Russell. — Be it so. I think I have in effect already said so, because I pointed out that in answer to Mr Webster, who says “ can you in justification of this show that the necessity was instant, overwhelming, leaving no choice of means, and no moment for deliberation ”, Lord Ashburton proceeds to accept that and justify it.

Now, before the Tribunal rises, as my learned friend has been good enough to call attention to this point, let me refer to the bottom of page 186. Lord Ashburton says :

Give me leave, sir, to say, with all possible admiration of your very ingenious discussion of the general principles which are supposed to govern the right and practice of interference by the people of one country in the wars and quarrels of others, that this part of your argument is little applicable to our immediate case. If Great Britain, America, or any other country, suffer their people to fit out expeditions to take part in distant quarrels, such conduct may, according to the circumstances of each case, be justly matter of complaint, and perhaps these transactions have generally been in late times too much overlooked or connived at.

That is very much what Lord Palmerston had said :

But the case we are considering is of a wholly different description, and may be best determined by answering the following question : Supposing a man standing on ground where you have no legal right to follow him, has a weapon long enough to reach you, and is striking you down and endangering your life, how long are you bound to wait for the assistance of the authority having the legal power to relieve you ? Or, to bring the facts more immediately home to the case, if cannon are moving and setting up in a battery which can reach you, and are actually destroying life and property by their fire ; if you have remonstrated for some time without effect and see no prospect of relief, when begins your right to defend yourself, should you have no other means of doing so than by seizing your assailant on the verge of neutral territory ?

The President. — It is not necessary for your case to settle whether that it is an act of legitimate self-defence.

Sir Charles Russell. — That is what Lord Ashburton said.

The President. — I think that is perfectly right. I believe he is more moderate and appropriate in his terms than Lord Palmerston was.

Sir Charles Russell. — Lord Palmerston was a man who used strong language, or at all events had the credit of doing so.

The President. — Well I suppose if you say so there was no harm in my saying what I did.

Adjourned till to-morrow at 11.30.

TWENTY-EIGHTH DAY, MAY 26TH, 1893

Sir Charles Russell. — Mr President, I wish to recall to the minds of the members of the Tribunal the subject we are discussing, and the position that it holds in the main argument in the case. I have dealt, as the Tribunal will remember, with the alleged claims of property in the seals and of an alleged invasion of right as regards the industry; and I have endeavoured to establish, and I hope have established, that there was neither property in the seals, nor any right to the industry invaded by pelagic sealing; and, therefore, I have stated that if there were no rights which called for or authorized protection or justified protection, it was not necessary to discuss, or essential to discuss, what would have been the rights of protection had property in fact existed, or had the rights of the industry in fact been invaded. But it is, nevertheless, not without importance to follow my learned friend's line of argument and illustrations as set out in this Argument, in order to see whether it affects in any way the truth of the proposition that the pacific rights of nations, that is to say the rights of nations in time of peace, against ships of a friendly Power on the high seas, are of an exceedingly restricted and narrow kind. We must assume that the industry exists, and that my learned friends have produced in argument the cases which they believe are most in point to establish their view of what the rights of self-preservation and of defence will justify nations in resorting to in time of peace. Therefore, it cannot be said, I think, that the time is wasted in discussing, as I must do, these cases.

I had referred to the case of the "Caroline"; I have only further to say, in relation to it, that from the standpoint from which I am asking you to consider the question, it is entirely unimportant whether you are to take the ground upon which Lord Palmerston, in the early part of the correspondence, based the action of the British Government, namely that it was an act done to put down a body of marauders who were contemplating offensive operations on British territory, or whether you are to adopt, as Lord Ashburton did, the formula put before him, or suggested to him, by Mr Webster when he used that emphatic language pointing out that the strict emergency of the case could alone justify any exceptional measures.

I conclude my reference to the subject by citing the fact that Lord Ashburton finally made a kind of apologetic statement, and that is rather significant in regard to the matter, showing that he regarded it on the border line. Chancellor Kent in his "International Law" referring to the matter (at page 148 of the 2nd edition by Mr Abdy) says this :

Her Majesty's Government having stated their regret at the violation of territory complained of, and at the omission, or neglect, to explain and apologize for that violation at the time of its occurrence.

And so forth.

The matter was then allowed to drop.

Mr Phelps. — Were you reading the language of Chancellor Kent or Mr Abdy the editor?

Sir Charles Russell. — This is the original text. It is noticeable also that Lord Campbell who filled very high judicial offices in England—at one time he was Lord Chief Justice after having been Attorney General, and he was afterwards Lord Chancellor—that he, in reference to the case, (and this is noted at page 187 of my learned friend's Argument) refers to the affair of the "Caroline" as being a difficult matter, and he then goes on to say :

Even Lord Grey told me he thought we were quite wrong in what we had done.

And he goes on to say, assuming the facts to be as he states, that he, Lord Campbell, thinks it was justifiable. I read this for this purpose. It makes very little for my learned friend's contention to cite isolated cases in which things have been done by particular Governments and in particular circumstances, and to show that those Governments sought to justify what they had done under international law : the fact that they sought to justify it under international law would not prove that it was international law.

A large number of cases of that kind, acquiesced in by different Governments, might go, according to the extent and the number of instances and the period of time over which they extended—the general acquiescence and consent would go, according to the volume and importance of the cases, a certain way to prove what was international law : but isolated instances would not.

The next case my learned friend refers to is at page 153 of the printed book. That is the case of the fort on the Appalachicola river. This was a case, shortly stated, of putting down a band of marauders. I should have said that in every one of these cases we have tried to get at the original documents; if it be a United States case, at the United States documents; if it be a British case, at the British documents. This was a United States case, and I will refer for a moment to what is said in the argument about it. I will first read the account in the United States Argument.

In 1815, under orders of Mr Monroe, measures were taken for the destruction of a fort held by outlaws of all kinds on the Appalachicola River, then within Spanish territory, from which parties had gone forth to pillage within the United States. The governor of Pensacola had been called upon to repress the evil and punish the marauders, but he refused; and on his refusal the Spanish territory was entered and the fort attacked and destroyed, on the ground of necessity.

Now I take the original United States' documents; and I refer first to the communication from the acting Secretary of War, George Graham, to General Gaines. I am reading from page 1140 of the United States' Official Papers :

The papers have been submitted to the President, and I am instructed by him to inform you that he approves of the movement of the troops from Fort Montgomery to Fort Scott. The appearance of this additional force, he flatters himself, will at least have the effect of restraining the Seminoles,

those are the Seminole Indians, with whom the United States was at that time at war,

from committing farther depredations, and perhaps of inducing them to make reparation for the murders which they have committed. Should they, however, persevere in their refusal to make such reparation, it is the wish of the President that you should not *on that account* pass the line and make an attack upon them within the limits of Florida until you shall have received further instructions from this Department.

And, on page 1141, there is a further communication to the same gentleman commanding the United States' forces :

Should the Indians, however, assemble in force on the Spanish side of the line and persevere in committing hostilities within the limits of the United States, you will in that event exercise a sound discretion as to the propriety of crossing the line for the purpose of attacking them and breaking up their towns.

The proclamation of General Jackson on the 29th of May, 1818, completes all I need trouble you with in this connection. This is the Proclamation :

Major-General Andrew Jackson has found it necessary to take possession of Pensacola.

He has not been prompted to this measure from a wish to extend the territorial limits of the United States, or from any unfriendly feeling on the part of the American Republic to the Spanish Government. The Seminole Indians inhabiting the territories of Spain have, for more than two years past, visited our frontier settlements with all the horrors of savage massacre. Helpless women have been butchered, and the cradle stained with the blood of innocents. These atrocities, it was expected, would have early attracted the attention of the Spanish Government and, faithful to existing Treaties, speedy measures adopted for their suppression. But so far from being able to control, the Spanish authorities were often compelled, from policy or necessity, to issue munitions of war to these savages; thus enabling, if not exciting, them to raise the tomahawk against us.

That is his justification. I need not point out that that is a state of war.

Mr Phelps. — You do not mean that that is the transaction that is referred to in my Argument; that is three years later — the occupation of Pensacola for a different reason.

Sir Charles Russell. — Yes, this is the occupation of Pensacola that I have been reading.

Mr Phelps. — But it is some years after. I do not object to your reading it, of course.

Sir Charles Russell. — I assure you it is part of the story and the same transaction. It begins on October 17th, or at least the earliest communication I have read is then, and the proclamation of General Jackson, after the attack, is on the 29th May, 1818. The mistake that my learned friend has fallen into, with great deference is, that it is not 1815 but 1817. I think that my learned friend will find we are right in that.

We have had a careful search made through the whole of the American papers of the time, and that is the only one which we can identify as being referred to in this Argument. But whatever the time may be, my learned friend, I think, will not deny that the statement in his Argument that it was "held by outlaws of all kinds on the Appalachieola River, then within Spanish territory, from which parties had gone forth to pillage within the United States" relates to the Seminole Indians to whom I have referred. About that there can be no doubt.

Now the next case which my learned friend refers to is at the bottom of the same page :

A similar case was that of Greytown. It was a port on the Mosquito coast, in which some United States citizens resided. These citizens, and others interested with them in business, were subjected to gross indignities and injuries by the local authorities, who were British, but who professed to act from the authority of the king or chief of the Mosquito Islands. The parties then appealed to the commander of the United States sloop of war *Cyane*, then lying near the port, for protection. To punish the authorities for their action he bombarded the town. For this act he was denounced by the British residents, who claimed that the British Government had a protectorate over that region. His action was sustained by the Government of the United States, the ground being the necessity of punishing in this way the wrong to citizens of the United States, and preventing its continuance.

Now, here again, we have the Official Papers. The United States' President, at that time Mr Franklin Pierce, in his Message to Congress explains this occurrence. He says, after referring to the position of American interests in Central America, and to the necessity for establishing inter-oceanic communication across the Isthmus —

A Company was organized under the authority of the State of Nicaragua, but composed for the most part of citizens of the United States, for the purpose of opening such a transit way by the River San Juan and Lake Nicaragua, which soon became an eligible and much-used route in the transportation of our citizens and their property between the Atlantic and Pacific.

Meanwhile, and in anticipation of the completion and importance of this transit-way, a number of adventurers had taken possession of the old Spanish Port at the mouth of the River San Juan in open defiance of the State or States of Central America, which, upon their becoming independent, had rightfully succeeded to the local sovereignty and jurisdiction of Spain. These adventurers undertook to change the name of the place from San Juan del Norte to Greytown; and though at first pretending to act as the subjects of the fictitious Sovereign of the Mosquito Indians, they subsequently repudiated the control of any Power whatever, assumed to adopt a distinct political organization, and declared themselves an independent Sovereign State.

Then he goes on : —

At a later period, they organized a strong force for the purpose of demolishing the establishment at *Punta Arenas*; but this mischievous design was defeated by the interposition of one of our Ships of War at that time in the Harbour of San-Juan. Subsequently to this, in May last, a body of men from Greytown crossed over to Punta Arenas, arrogating authority to arrest on the charge of murder a

captain of one of the steamboats of the Transit Company. Being well aware that the claim to exercise jurisdiction there would be resisted then, as it had been on previous occasions, they went prepared to assert it by force of arms. Our Minister to Central America happened to be present on that occasion.

And he proceeds to state how he was threatened upon American territory; and thereupon they proceeded to bombard the town in which these people took refuge; and he says finally : —

This pretended community, a heterogeneous assemblage, gathered from various countries and composed for the most part of blacks and persons of mixed blood, had previously given other indications of mischievous and dangerous propensities. Early in the same month, property was clandestinely abstracted from the depot of the Transit Company and taken to Greytown. The plunderers obtained shelter there, and their pursuers were driven back by its people, who not only protected the wrongdoers and shared the plunder but treated with rudeness and violence those who sought to recover their property. Such, in substance are the facts.

And so on.

And, finally, he describes it as a place which they were justified in bombarding,

it was in fact a marauding establishment too dangerous to be disregarded, and too guilty to pass unpunished, and yet incapable of being treated in any other way than as a piratical resort of outlaws, or a camp of savages, depredating on emigrant trains or caravans and the frontier settlements of civilized States.

The bearing of their illustration upon the question of seizing and confiscating a ship because it caught or was about to catch a seal, half a dozen seals or a dozen seals, — I suppose the number makes no difference — seems somewhat remote.

The President. — Have you official statements of the view of the British Government on that business?

Sir Charles Russell. — I am not sure.

The President. — It was invoked as a protector; and it would be interesting to know what was the view of the British Government as to that.

Sir Charles Russell. — I will see if I have the document. We have a despatch which I have not read, and I will go through it.

The President. — It may be of interest in their view of the question.

Sir Charles Russell. — Yes. I should think it exceedingly likely that they thought that the United States Government had gone a great deal too far; but I will read the despatch in a moment.

Now on page 154 you will find a reference, which will be easily appreciated, to the Orders in Council of 1809. This is touching on a very sore subject, though its soreness has been somewhat mitigated by time. One great Power was at war, practically, with a combination of other European Powers, and the Emperor Napoleon had prohibited British commerce with certain neutral ports; and, as a retaliatory measure of war, British Orders in Council were issued exactly in the same way as had been done by Napoleon : there was a similar interdiction : it was act against act : the Powers were involved in a struggle for

mastery, each doing what it could to minimise the enemy's powers of resistance and attack. What light it throws on this matter I confess I do not know, but I do observe that when the Orders in Council were brought before prize courts for adjudication, the exceptional character of these Orders in Council was recognized; for I see at page 155 of the Argument of the United States my friend cites, with great fairness, from Lord Stowell, then Sir William Scott :

Again, speaking of those retaliatory measures as necessary for the defense of commerce, he says in another case : —

In that character they have been justly, in my apprehension, deemed reconcilable with those rules of natural justice by which the international communication of independent States is usually governed.

And immediately before that he says :

When the State, in consequence of gross outrages upon the laws of nations committed by its adversary, was compelled by a necessity which it laments, to resort to measures which it otherwise condemns, it pledged itself to the revocation of those measures as soon as the necessity ceases.

And this again was war. They were engaged in what may be described as a death struggle.

Now, Mr President, I come to a reference on page 155 which is of quite a different character, introduced here strangely out of its order as it seems to me. It is a statement, and, as we conceive, an entirely misleading statement as to the views asserted by Great Britain in relation to rights of fishery off the coasts of Newfoundland and Nova Scotia. At best it would be an *argumentum ad hominem*; but it is so seriously in error in point of fact that I think it is well that the matter should be fully, clearly, and chronologically put before this Tribunal. I say so all the more because, in relation to this matter of the Newfoundland fishery, Mr Phelps on page 157 of his argument says :

If the countries now contending were right then,

that is to say, in reference to the fishery claims on the east coast of America, and on the coasts of Newfoundland and Nova Scotia.

in the views entertained by both governments and by all who were concerned for them, in cabinets, diplomacy, Congress, and Parliament, and in the claims then made, conceded and acted upon ever since, the precedent thus established must be decisive between them in the present case. There can not be one international law for the Atlantic and another for the Pacific. If the seals may be treated, like the fish, as only *feræ naturæ*, and not property, if the maintenance of the herd in the Pribilof Islands is only a fishery, how then can the case be distinguished from that of the fisheries of Nova Scotia and Newfoundland? Why would it not be, until conceded away by treaty or thrown open to the world by consent, a proprietary right belonging to the territory to which it appertains, and which the Government has a right to defend?

I have to say, in the first instance, that I accept the challenge which

is covered by that statement. We do not insist, and I shall prove we have not insisted, on a different law, or upon different principles of law in relation to the subject-matter here referred to, from those that we are insisting upon in this controversy to-day; and that we should be quite content to have the law which applies and exists, and the rights that are claimed in respect of the fisheries of Newfoundland and Nova Scotia, applied to the controversy which we are here engaged upon.

Now, I would like to remind the Tribunal shortly (for I must be pardoned for dealing with this a little exhaustively), how this matter arises. When America (that which is now the United States, or part of it), was a Colony of Great Britain, Great Britain had entered into certain Treaties with Spain and with France, under which Treaties unquestionably there were conceded to Great Britain fishing rights over a considerable extent of the sea beyond the 3-mile territorial limit. It is not *ad rem* to go into the history of those Treaties. It is enough to say that those extended rights as between those Powers, parties to the Treaties, were given by the Treaties, in other words, by Convention and Agreement of the parties. In 1776 the American Independence was declared; and, following that Declaration of Independence and after the War of Independence, the Treaty of 1783 was entered into between Great Britain and the new independent Sovereign Power, now the United States. I first call your attention to what that Treaty was.

I wish to remind you, before I refer to it, that my friend Mr Carter, no doubt with Mr Phelps' Argument before him, asserted a contention based upon the statements contained in the Argument. On the 21st of April, on pages 492 and 493 of the printed report will be found my friend Mr Carter's argument.

Now I have instanced the Pribilof Islands. Take the fisheries on the banks of Newfoundland, which are also another illustration of that. I will not say that they are a full and perfect illustration, but they will answer for the purpose of my argument. Great Britain asserted, at an early period, an exclusive right to the fisheries on the Newfoundland banks because she had created a national industry which was engaged in, and sustained, by her subjects resorting to those banks for the purpose of gathering fish. And she claimed that the carrying on of that industry was a property of hers. Upon the United States gaining its independence, the United States asserted a right to participate in those industries. They said, 'We were a part of Great Britain originally, and, indeed, were the people who went there and created this industry; but, having gained our independence, we have not lost our right to carry on this fishery'. That right was denied, and an attempt to exclude them was still maintained, it being admitted on both sides that it was an industry to which each nation had a peculiar claim, Great Britain insisting it was her own and that the United States had no right to it, and the United States going on the ground that it was a national industry, and that they had a right to participate in it, because they were one of the original creators of it. There are numerous other cases of laws passed by Great Britain for the purpose of protecting the Herring Fisheries, and so on.

The President. — Are those fisheries exclusive of other nations than American and English?

Mr Carter. — I do not think they are practically asserted now as being exclusive of other nations; but they were originally, and there were contests with other

nations for the possession. They tend to illustrate my argument only; in the particular case they were not defensible, but they illustrate the view. The correspondence is printed in our Argument which fully supports it.

The President. — But if the exclusive right was not maintained?

Mr Carter. — It was maintained for a while; but I do not think it has been maintained down to now.

Thereupon, my learned friend, Mr Phelps, interposes and expresses his dissent from that, and intimated, as I gathered from him (he will correct me if I am wrong) that he meant to say in some sense or other that assertion was doubted.

Mr Phelps. — What I said was, our fishery rights now are derived under the Treaty of 1779.

Sir Charles Russell. — That goes without saying; that is not the point.

Mr Phelps. — Not as a right; but as under the Treaty with Great Britain.

There are certain fishing rights, undoubtedly, that the United States have under the Treaty with Great Britain. That is true; I am going to show what they are, and that they are in territorial waters; and also that outside territorial waters the United States has those rights not under Treaty at all, but as a recognized part of the general right of mankind, and I will justify this by reference to the Treaty which is before me. I understand my friend Mr Phelps did not mean to intimate that he was differing from Mr Carter and that there was, now, asserted any right inconsistent with the general right of all mankind to fish in extra-territorial waters.

Mr Phelps. — What I meant to say was that the question having been decided by Treaty between Great Britain and the United States, this right of fishing in the open sea had never come up as an actual question since, that I know of.

There has been great discussion about territorial rights. The case is cited for the purpose of showing that it was claimed and conceded on both sides that the fishery to a great distance out into the sea belonged to Great Britain as an appurtenance to its territory.

Sir Charles Russell. — That is a little different from the way in which it is put in the case; nor is it the historical fact. I will show what the exact case is in a moment, but my friend will see that in page 156 of his Argument he puts it differently.

He says at the bottom of page 156 :

Upon this view entertained by both nations and by all the eminent diplomats and statesmen who participated in making or discussing these treaties, the contention turned upon the true construction of the grant of fishing rights contained in the treaty of 1783. It was claimed by the British Government that this was a pure grant of rights belonging exclusively to Great Britain, and to which the Americans could have no claim, except so far as they were conferred by treaty.

I shall show that that is not so. Then my learned friend goes on :

It was contended on the other side, that the Americans, being British subjects

up to the time of the Revolutionary War, entitled and accustomed as such to share in these fisheries, the acquisition of which from France had been largely due to their valour and exertions, their right to participate in them was not lost by the Revolution, nor by the change of government which it brought about, when consummated by the treaty of 1783. And that the provisions of that treaty on the subject were to be construed, not as a grant of a new right, but as a recognition of the American title still to participate in a property that before the war was common to both countries. Which side of this contention was right it is quite foreign to the present purpose to consider. It is enough to perceive that it never occurred to the United States Government or its eminent representatives to claim, far less to the British Government to concede, nor to any diplomatist or writer, either in 1783 or 1815, to conceive, that these fisheries, extending far beyond and outside of any limit of territorial jurisdiction over the sea that ever was asserted there or elsewhere, were the general property of mankind, or that a participation in them was a part of the liberty of the open sea. If that proposition could have been maintained, the right of the Americans would have been plain and clear.

Now that is an entire misconception, as I conceive. In the first instance, let me point out that so far as any special rights were conceded by France — I have told the Tribunal there were such — they were conceded by Treaty. So as regards Spain; but those Treaties only bound Spain and only bound France, and would not have interfered one iota with the right of any other nation over the area affected by them. It bound them and bound them only. But here is the Treaty of 1783 to speak for itself, and you will see that it recognizes the right to fish in the non-territorial waters; but that it concedes to the United States certain rights in the territorial waters, and that the only dispute that has existed between the United States and the Government of the Queen has been, since those Treaties, as to the interpretation of portions of it which relate to bays and so forth — how they were to be construed and how their limits were to be defined. That arises under a Treaty of 1818, to which I shall come presently.

Mr Phelps. — I quite agree Sir Charles with your construction of the Treaty of 1783. What I cite is the opinions given on both sides at the time they were negotiating.

Sir Charles Russell. I do not understand really how my friend, consistently with what I have just read, can say that he agrees with it, unless he means to retract that argument as it appears in the printed Argument.

In order that what I am now about to read may be intelligible to the Tribunal — I am sorry to have to go into it in detail, but I wish to clear it up and make it quite apparent what the true position of things is, — I may say that after that Treaty of 1783, there was, as the Tribunal will recollect, at a later period, in 1812, a war with the United States, that war arising out of an attempt to take British sailors from American ships, which was resisted by the United States; the war ended by the Treaty of 1818, known as the Treaty of Ghent. I am going to refer now to the Treaty of 1783, after the Declaration of American Independence; article 3 is as follows :

ARTICLE III

It is agreed that the people of the United States shall continue to enjoy unmolested the right :

1. To take fish of every kind on the Grand Bank and all the other banks of Newfoundland.
2. Also in the Gulf of St Lawrence.
3. And at all other places, in the sea, where the inhabitants of both countries used at any time heretofore to fish. And also, that the inhabitants of the United States shall have liberty :

You note the difference between the two.

1. To take fish of every kind on such part of the coast of Newfoundland as British fisherman shall use (but not to dry or cure the same on that island) ”.

In other words, the right is acknowledged to take the fish outside non-territorial waters. *Inside* the territorial waters the liberty is given, under this Treaty, to take fish of every kind and to use them as British fishermen may use them, except that they are not to have the right of landing on the island for the purpose of curing.

Then it says :

2. And also on the coasts, bays and creeks of all other of His Britannic Majesty's dominions in America.
3. And that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same, or either of them, shall be settled, it shall not be lawful for the said fishermen to dry and cure fish at such settlement without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground.

Now how was this Treaty regarded by the United States people themselves? I refer here again, as I have always tried to do all through, to official documents as to which there can be no doubt, and for this purpose I refer to the Report of the Committee of Foreign Affairs of the House of Representatives, of January 18th 1887; and referring to this Treaty, they say :

It will be observed that this Article, in continuing, confirming, and establishing the thirteen States and their inhabitants in the taking of fish on the banks, in the gulf, and in the sea, uses the word “rights”; but uses the word “liberty” in confirming to American fishermen the taking of fish on the coasts, bays, and creeks of every part of the British dominions in America. The word “rights” is thus applied to fishing in the open sea, which by public law is common to all nations, and was intended to affirm that Great Britain did not claim to hold by Treaty engagements, or in any other manner, and exclusive right of fishing therein. The word “liberty” is thus applied to taking fish, to drying and curing fish, on what was, anterior to the Treaty, within the jurisdiction, or territorial waters, of Great Britain, but an exclusive right of taking fish therein was not hers. “Liberty”, as thus used, implies a freedom from restraint or interference in fishing along the British coasts.

The distinction you see, therefore, is plainly and clearly drawn by the

American representatives themselves. Again, at a later page, page 38 of the same Report they say :

England contended that the word « right » in the Treaty of 1783 was used as applicable to what the United States were to enjoy in virtue of a recognized independence, and the word « liberty » to what they were enjoy as concessions strictly dependent on the existence of the Treaty in full force, which concessions fell, as England asserted, on the declaration of war by the United States, and would not be revived excepting for an equivalent.

Therefore, so far away as 1812 the contest between the United States and Great Britain took this form. Great Britain said : so far as the fishing in non-territorial waters is concerned, you have the same rights as British subjects have, and as all the world has ; but as regards these special liberties which were given to you under the Treaty of 1783, which enabled you to come into territorial waters, and into the creeks and places where you would not otherwise have a right — as regards those which are given to you by the Treaty, your title to which is by the Treaty ; those rights are annulled by the fact of war, which has, by international law, put an end to the Treaty.

I might almost leave the matter there, but it is perhaps better that I should go through it. I have read what the Representative Committee of the United States said in 1787. In 1788 the Senate Committee on Foreign Relations, referring to the Treaty of 1783, reported in these words. My learned friends probably have the reference to the document. It is N° 109 of the fifth Congress, first session, page 2, Miscellaneous Documents. They there report as to the open sea fishing. It was merely a recognition of a right common to all nations, and as to the fishing on the coasts, bays and creeks within the municipal dominion of His Majesty. It was an averment that these rights, theretofore existing in all British subjects, should have belonged as of right to those British subjects who by the rebellion had become the citizens of an independent nation. You observe therefore the recognition of the view which I am now putting before you. I am reading these out of order of date, because they refer back to the Treaty of 1783. There was the war of 1812, the Treaty of Peace of 1815, and the Fishery Treaty of 1818. The document is to be found in the 3rd volume of Wharton's Digest of International Law, at page 304. In 1814 Commissioners from Great Britain and the United States met at Ghent for the purpose of opening negotiations for peace. What I am about to read is an extract from the instructions given to the British Commissioners on the subject of the fisheries that will present the view on both sides of the question. These are of the 28th July, 1814, State Papers, volume 1, page 1543 :

But the point upon which you must be quite explicit from the outset of the negotiations is the construction of the Treaty of 1783 with relation to the Fisheries. You will observe that the 3rd Article of that Treaty consists of two distinct branches. The first which relates to the open sea fisheries we consider of permanent obligation, being a recognition of the general right which all nations

have to frequent and take fish on the high seas. The latter branch is, on the contrary, considered as a mere conventional arrangement between the two States, and as such to have been annulled by the war. You will see it is an entirely erroneous view to suggest that at any time and in any part of this discussion, Great Britain was asserting that the open sea was not open to all mankind as between the United States and herself, or that she was conferring upon the United States a privilege which she did not have as a general right.

The matter is important, but I am afraid I am wearying the Tribunal by reading too much.

The President. — Well, it is a weighty comparison and of great interest.

Sir Charles Russell. — I read now from the communication from Lord Bathurst, the then Foreign Secretary of Great Britain, 30th October, 1815. I am reading from the volume of the American State Papers, Class 1, Foreign Relations, vol. 4, page 355. Mr John Quincy Adams was then Secretary of State for the United States, and Lord Bathurst is addressing him on the position of affairs. The date of the title page is 1834.

Mr Phelps. — We have the book, I understand.

Sir Charles Russell. — No doubt.

But the rights acknowledged by the Treaty of 1783 are not only distinguishable from the liberties conceded by the same Treaty, in the foundation upon which they stand, but they are carefully distinguished in the Treaty of 1783 itself. The undersigned begs to call the attention of the American Minister to the wording of the first and third Articles, to which he has often referred for the foundation of his arguments. In the first Article Great Britain acknowledges an independence already expressly recognized by the Powers of Europe and by herself in her consent to enter into provisional Articles of November 1882. In the third Article —

the one I read —

Great Britain acknowledges the *right* —

it is printed in italics —

of the United States to take fish on the banks of Newfoundland and other places from which Great Britain has no right to exclude an independent nation.

These banks are I think something like 100 miles from the coast of Newfoundland, but they were to have liberty to cure and dry fish in certain unsettled places; and he then goes on to another branch of the subject,

I find also that the Counsel for the United States in the case of the Halifax Commission 1877 refers to these Treaties, and says :

The Treaties of 1818, 1854 and 1871 related solely to fishing within the three miles. The Treaty of 1783 *recognizes* the right of American fishermen to take on the banks on the high seas, a right which had always belonged to American fishermen, never ceded to them by any Treaty, but which they held by the right of common humanity.

Now, on the same occasion, Mr Dwight Foster, who was then the Agent of the United States, treats the matter thus. I am reading here from volume II, page, 591, of the report of that Fishery Commission.

He says :

Early in the diplomatic history of this case, we find that the Treaty of Paris in 1763 excluded French fishermen three leagues from the coast belonging to Great Britain in the Gulf of St Lawrence, and fifteen leagues from the island of Cape Breton. We find that the treaty with Spain in the same year contained a relinquishment of all Spanish fishing rights in the neighbourhood of Newfoundland. The Crown of Spain expressly desisted from all pretensions to the right of fishing in the neighbourhood of Newfoundland. Those are the two treaties of 1763, the Treaty of Paris with France and the Treaty with Spain. Obviously, at that time, Great Britain claimed for herself exclusive sovereignty over the whole Gulf of St Lawrence and over a large part of the adjacent seas.

I have already pointed out that she claimed that under a Treaty, whether rightly or wrongly :

By the Treaty of Versailles in 1783, substantially the same provisions of exclusion were made with reference to the French fishermen. Now, in that broad claim of jurisdiction over the adjacent seas, in the right asserted and maintained to have British subjects fish there exclusively, the fishermen of New England, as British subjects, shared. Undoubtedly the pretensions that were yielded to by those Treaties have long since disappeared. Nobody believes now that Great Britain has any exclusive jurisdiction over the Gulf of St Lawrence or the Banks of Newfoundland, but at the time when the United States asserted their independence and when the Treaty was formed between the United States and Great Britain, such were the claims of England, and those claims had been acquiesced in by France and by Spain. That explains the reason why it was that the elder Adams said he would rather cut off his right hand than give up the fisheries at the time the Treaty was formed, in 1783, and that explains the reason why when his son John Quincy Adams was one of the Commissioners who negotiated the Treaty of Ghent, at the end of the war of 1812, he insisted so strenuously that nothing should be done to give away the rights of the citizens of the United States in these ocean fisheries.

Now I have a further reference to make to the Committee of Foreign Relations of the United States Senate, coming down a little later. This refers to the Treaty of 1818, and I have already given the reference where that Treaty is to be found. This is the third volume of Wharton's International Law, Section 304. It recites that,

Whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of His Britannic Majesty's dominions in America, it is agreed between the High Contracting Parties that the inhabitants of the said United States *shall have forever, in common with the subjects of His Britannic Majesty*, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbors, and creeks, from Mount Joly on the southern coast of Labrador, to and through the straits of Belleisle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson Bay Company : and that the American fishermen shall also have liberty for ever to dry and cure fish in

any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland, above described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included within the above mentioned limits : provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

This is solely conversant with the question of facilities and advantages in territorial waters, and has no reference to the question of open sea fishing.

Now in reference to that Treaty of 1818, the Committee of Foreign Relations of the United States Senate (a reference which is to be found in the United States Papers, No 109), says :

Thus it will be seen that the matter to be dealt with was a claim in favour of the inhabitants of the United States to do certain things within the territorial dominion of His Majesty, and not a matter touching the right of the inhabitants of the United States to cruise, fish, or do any other thing in waters that by the public law of nations did not belong to the territorial jurisdiction of His Majesty.

Then follows a discussion as to the meaning of the word " bays ". I do not think I need read that. As a matter of fact, for years upon the banks of Newfoundland, and without any question, outside the territorial limit, the fishermen of France, of the United States, of Canada, and of Great Britain are to be found pursuing their calling.

Now I really must ask the Tribunal to allow me to read again this extraordinary statement beginning at page 156 of the United States Argument, in view of what I have now read to you.

It is enough to perceive that it never occurred to the United States Government or its eminent representatives to claim, far less to the British Government to concede, nor to any diplomatist or writer, either in 1783 or 1815, to conceive that these fisheries, extending far beyond and outside of any limit of territorial jurisdiction over the sea that ever was asserted there or elsewhere, were the general property of mankind, or that a participation in them was a part of the liberty of the open sea. If that proposition could have been maintained, the right of the Americans would have been plain and clear.

Now, I have demonstrated, I submit, that the Treaty of 1783 recognized the right in the open sea, and that it granted concurrently with the recognition of that right in the open sea certain rights within territorial waters in British territory. It never was suggested that the former right was affected or touched by the question of the war. It was not a

Treaty right; it was a natural right. It was suggested that the war did put an end to the special privileges that were granted by virtue of the Treaty; but the special privileges in non-territorial waters alone were put an end to by the war.

The President. — Might not there be a difference in respect of time? The historical *exposé* of Mr Dwight Foster which you have just read seems to me to be practically correct; that Great Britain may have asserted in previous times the doctrine of *mare apertum* in opposition to *mare clausum* which was not quite acknowledged, — they asserted an exclusive right over part of those seas and fisheries which by progress of time and progress of ideas were considered abandoned, though they did not want to abandon it in fact. Towards the end of the eighteenth century it was abandoned; but, perhaps, at the time of the Treaty of Utrecht it was not quite clear.

Sir Charles Russell. — I began by telling you, Sir, there were such claims made by Great Britain, and she professed to base those claims on Treaty rights conceded by France and by Spain. That is so. I did not stop to consider whether she would be justified under those Treaties in making that pretension at all. I have stated what was asserted, what was put forward. There were certain Treaty rights, but that is ancient history.

The President. — The Treaty rights were limited to about 100 miles.

Sir Charles Russell. — As I have already pointed out, and you were good enough to assent to my statement I think, even if such powerful nations as France and Spain had conceded to Great Britain rights over an area of the sea, they would not have the power of giving to Great Britain that right as against the people of any other nation in the world on the high seas. Of course, when the United States became an independent Power, one of the family of nations, it would have, in virtue of its sovereignty, the right to claim the free use of the high seas; but the point is this : that, from 1783 down through the whole of this negotiation, Great Britain has never asserted, and the United States has never alleged that she was asserting, that the right of fishery in the non-territorial waters was not a right that belonged to every independent nation. That is the point.

Senator Morgan. — Do you mean she has abandoned it since 1783?

Sir Charles Russell. — I do not know that that would be appropriate language. So far as I have read the history of it, there was no assertion of it : certainly not since 1783.

Senator Morgan. — There was some mention of it.

Sir Charles Russell. — I have read all the documents, and you have seen what mention there is of it. I have read that letter of Lord Bathurst, and I suppose I must read it again. That is going far enough back. Did you mean the United States abandoned it?

Senator Morgan. — No; Great Britain.

Sir Charles Russell. — Then I must read this letter of 1815. First

of all, the Treaty of 1783 shows it, as it seems to me; but here is the official statement.

The President. — I think there is no doubt as to that time. What I hint at is that perhaps in former times, say in the seventeenth century towards the middle or end, — perhaps at that time England may have asserted rights over the sea which it did not maintain in the course of the eighteenth century, and certainly not in the course of the nineteenth. It is rather perhaps a progress of theory than of right.

Sir Charles Russell. — I recognize an amiable effort to give an explanation of this paragraph, but I beg respectfully to say that this paragraph, is not capable of it, because the paragraph begins with 1783. It is not referring to anything antecedent to 1783. If it had, I should have begun earlier and examined it earlier, but it begins with 1783 and it begins with the erroneous statement that the right of fishing in the open sea was conceded by that Treaty to, or created by that Treaty in, the United States. That is the fallacy. Not only does it begin in 1783, but it absolutely goes on to say that the assertion was further made in 1815, because at the top of page 157, he says “ it never occurred to any of these diplomatists in 1783 or 1815 to conceive that these fisheries ” and so on, and yet in 1815 Lord Bathurst’s letter to the United States Minister (which I must read again) says :

But the rights acknowledged by the Treaty of 1783 are not only distinguishable from the liberties conceded by the same Treaty and the foundation upon which they stand, but they are chiefly distinguished in the Treaty of 1783 itself. The undersigned begs to call the attention of the American Minister to the wording of the first and third Articles to which he has often referred for the foundation of his argument. In the first article Great Britain acknowledges an independence already expressly recognized by the Powers of Europe and by herself in her consent to enter into provisional articles in November 1782.

In the third article Great Britain acknowledges the *right* of the United States to take fish on the banks of Newfoundland and other places from which Great Britain has no right to exclude an independent nation, but they are to have the *liberty* to cure and dry them at certain unsettled places within his Majesty’s territory.

I think, even if that right was asserted at some earlier period, Senator Morgan will see that that is a clear abandonment.

I leave this branch of the subject by expressing my agreement with the opinion stated on page 157 of the United States Argument, that there can not be one international law for the Atlantic, and one for the Pacific, and I agree the law is the same for each — that outside the territorial limits there is an unrestricted right and liberty for all mankind to take what it can from the bosom of the sea.

The next subject that is dealt with as to self-preservation in time of peace is the law of Quarantine, which is referred to on page 159 :

“ Upon this principle also ”, he says, “ was based the British act putting restrictions upon the passage of a vessel on the high sea, approaching Great Britain from a port where infectious disease was raging. Quarantine and health regulations are usually enforced within the jurisdictional limit, and so confined, are in ordinary cases sufficient for their purpose. But when in a particular case they are

insufficient, and the necessity of protecting the country from incursion of dangerous disease requires it, no right of freedom of the sea stands in the way of putting proper restrictions on the approach of vessels, at any distance from the shore that may be found requisite.

I need not say that this is a subject as to which there would be a ready concurrence of all civilized nations to prevent the spread of disease, and any measures that required to be adopted are not measures that would be likely to be called in question by any nation, or as to which it would be necessary to resort to the enforcement of any international principle at all. My learned friend has misconceived the effect and character of these laws. The British statute is the 6th of George the Fourth, chapter 78, passed in 1825, which I have before me, and I will furnish my learned friend with it, if he desires. For brevity, I will read a carefully prepared and correct summary of that statute. First of all, the Act deals with vessels coming to the shores of a particular nation in the same way as the Hovering Acts. It deals therefore solely with vessels coming to British ports. It does not profess to deal in any other way with vessels beyond the three-mile limit coming from infected places. The following only are subject to quarantine : — first, vessels coming to the United Kingdom from infected places ; secondly, boats receiving persons and goods from vessels which have come from or touched at infected places ; and, thirdly, persons or goods on board of such vessels coming from or having touched at infected places, or on board such receiving boats, in order to meet the case of trans-shipment from infected vessels.

The Quarantine
analogy.

What are the enacting provisions in relation to those classes of vessels or goods coming from vessels or boats which have come from infected places? Vessels liable to quarantine, that is, vessels or receiving boats coming to United Kingdom ports, because, of course, the quarantine is to be performed with reference to the port to which it is destined and in the port of the territory, — vessels liable to quarantine are to hoist quarantine signals on meeting any other vessel at sea or when they are within two leagues of the United Kingdom coast. Signals are to be continued so long as the meeting vessel continues in sight, or the vessel itself remains within two leagues of the coast of the United Kingdom, and until the vessel shall have arrived in a United Kingdom port ; and, if it fails to do that, there is a penalty of £ 100 fixed for it ; and that applies to all ships. How is this penalty to be recovered? It never can touch any vessel that does not come to the port, because, under section 35, the only remedy for the recovery of the penalty is by proceeding in a local Court against the Captain of the vessel ; and, therefore, although it speaks of the penalty being incurred if the quarantine signal is not hoisted when it approaches within two leagues, it cannot be operative until the ship herself, with the Captain on board of her, has come within the territorial jurisdiction of the port.

Further, vessels having infectious disease on board are required to

hoist a signal when they meet any other vessel at sea or are within two leagues of the United Kingdom coast; and the signal is to remain hoisted so long as the meeting vessel remains in sight, or the vessel itself remains within two leagues of the United Kingdom coast while so in sight or within such distance, until it shall have arrived at the port where it has to perform quarantine. This is the whole of the Statute, I think.

The President. — I suppose that Statute is in application now, — is it still in vigour?

Sir Charles Russell. — We have made the enquiry through the Privy Council Office as to whether there was any record of its ever having been put in force against foreign vessels, and this is the answer we got : — Section 8 of the Act enjoined certain formalities on vessels liable to quarantine as soon as they passed within two leagues of the British coast; but the Act provides no machinery for enforcing these Regulations on vessels that do not come within the ordinary limits, or communicate with the shore, and the Privy Council are aware of no instance of any attempt to interfere with any vessel simply passing outside the 3-mile limit, and, in fact, such interference would have been, as far as they understand, both unnecessary and illegal.

Mr Phelps. — Is the Act repealed?

Sir Charles Russell. — No. It is, therefore, not a Statute which enforces any penalty *in rem* against the ship at all; it is one which simply imposes a penalty against the Captain, which is not enforceable till he comes within the jurisdiction of the Court, and comes with the ship into the port, and which can only be recovered in the local municipal Court.

Of course the performance of quarantine is an operation which must be gone through in the territory of the port. The observation of Lord Chief Justice Cockburn alludes to this in his Judgment in *the Queen v. Keyn*, and he treats it, and I think correctly treats it, thus. He says :

I am further of opinion that Parliament has a perfect right to say to foreign ships that they shall not, without complying with British law, enter into British ports, and that if they do enter they shall be subject to penalties, unless they have previously complied with Requisitions ordained by the British Parliament.

A proposition which is, as I submit, perfectly sound.

Let me just illustrate that. I am quite unable to appreciate what is in my friend's mind about this. Does he suggest that, under this law, we could go outside territorial waters and seize the ship — for instance, a ship that was passing through the British Channel, beyond the three mile limit, on its way to some European port? Does he suggest that we could under this Statute go outside the territorial limits and seize that ship because she had not hoisted a signal? Such a thing would be impossible. The Statute creates a penalty, a penalty only recoverable against the captain, and only recoverable in a municipal court, when the ship arrives within the territory.

Now I come to the next question, which my friend treats as important,

which covers some space in the printed Argument. I am referring to the last sentence of page 160, where my friend says :

Upon the same principle has been maintained the right of visitation and search, as against every private vessel on the high seas, by the armed ships of any other nationality. Though this vexations and injurious claim has been much questioned, it is firmly established in time of war, at least, as against all neutrals. Says Sir William Scott—

And then he proceeds to give a citation. Then he says :

It has been said that the right of search is confined to a time of war.

Certainly it is, and will still be said, except under Treaty. Then my friend continues :

That assertion proceeds upon the ground that only in time of war can the necessity for it arise. No one has ever claimed that the right should be denied in time of peace, if an equal necessity for it exists. And when such necessity has been regarded as existing, the right has been asserted. Prior to the war of 1812, between the United States and Great Britain, the latter country claimed the right in time of peace to search American ships on the high seas for British subjects serving as seamen. Though the war grew out of this claim, it was not relinquished by Great Britain when a treaty of peace was made. It has been disused, but never abandoned.

Now I stop there for a moment, and I proceed to examine the question. And first I would like to make one general observation upon it. It is quite true that at that time an attempt was made by Great Britain to assert the right to take British seamen from the ships of the United States — perfectly true; and it is perfectly true also that at a later stage it was — I will not say asserted — but assent was sought to be obtained to the right to search vessels — to visit vessels — for the purpose of ascertaining their nationality; that is to say, it was not asserted there was a right to visit a United States or French vessel if it was merely a United States or a French vessel flying French or United States colours, the assertion was limited to the case where there was ground to suspect that the flag of France or the flag of the United States was used dishonestly or fraudulently in order to cover illicit trade in slaves. It is perfectly true that those two assertions were made, and now I proceed to show how they were dealt with, and to enquire whether this statement is correct, which my friend has thought right to put here in his Argument, that: “ Though the war grew out of this claim, it was not relinquished by Great Britain when a Treaty of peace was made. It has been disused, but never abandoned ”. That is the proposition that my learned friend puts forward.

Then he proceeds :

The objection to it on the part of the United States was the obvious one that it was founded upon no just necessity or propriety. Had it been a measure in any reasonable sense necessary to self-defense on the part of Great Britain, its claim would have rested on a very different foundation, and would have been supported by the analogy of all similar cases. The right of search is exercised without question as against private vessels suspected of being engaged in the slave trade.

I beg to say that that is a further inaccuracy, and that I think my friend, if he examines it carefully, will find that that is not correct, and that it is only under Treaty that there is such a right of search.

Then he goes on :

And it is very apparent, that as the increasing exigencies of international intercourse of all kinds render it necessary, the principle that allows it in time of war will be found sufficient to allow it in time of peace.

That is looking into the future. It is not considering what the law is, but suggesting what, at some future time, it may be.

Then he proceeds :

The rule, as has been seen, grows out of necessity alone, and must therefore extend with the necessity.

And thereupon he proceeds to refer to the correspondence of Lord Aberdeen.

I shall now bring this matter (beginning with the correspondence that is there referred to, from 1840 until the last occasion when the subject was referred, to as far as I am aware, in public — in Parliament), down to the year 1858, but I need not do that at any very great length.

Now Lord Aberdeen, who was then Prime Minister, writes to Mr Everett, who was at that time Secretary of State of the United States, on the 20th December 1841; and I will ask you, Mr President, when I read this, to see, — while it is as strenuous a demand on the part of the Foreign Minister for consent on the part of the United States to a course that the Minister of Great Britain is urging as eminently reasonable from his point of view, — whether it amounts to an assertion of it as a *right* at all, or whether it is not rather a demand for the reasonable assent on the part of the United States to what is suggested.

Now this is the language of Lord Aberdeen's letter :

The Undersigned, etc., has the honor of addressing to Mr Everett, etc., the observations which he feels called upon to make, in answer to the note of Mr Stevenson, dated on the 21st of October.

As that communication only reached the hands of the Undersigned on the day after the departure of Mr Stevenson from London, on his return to America, and as there has since been no Minister or Chargé d'Affaires from the United States resident in this country, the Undersigned has looked with some anxiety for the arrival of Mr. Everett, in order that he might be enabled to renew his diplomatic intercourse with an accredited Representative of the Republic. Had the Undersigned entertained no other purpose than to controvert the arguments of Mr Stevenson, or to fortify his own, in treating of the matter which has formed the subject of their correspondence, he would have experienced little impatience; but as it is his desire to clear up all doubt, and to remove misapprehension, he feels that he cannot too early avail himself of the presence of Mr Everett at his post, to bring to his knowledge the true state of the question at issue.

The Undersigned agrees with Mr Stevenson in the importance of arriving at a clear understanding of the matter really in dispute.

This ought to be the first object in the differences of States, as well as of individuals; and, happily, it is often the first step to the reconciliation of the parties. In

the present case, this understanding is doubly essential, because a continuance of mistake and error may be productive of the most serious consequences.

Would you, Mr President, kindly allow my friend Sir Richard Webster, to read this next passage for me.

Sir Richard Webster. — He goes on :

The Undersigned again renounces, as he has already done, in the most explicit terms, any right on the part of the British Government to search American vessels in time of peace. The right of search, except when specially conceded by Treaty, is a purely belligerent right, and can have no existence on the high seas during peace.

The Undersigned apprehends, however, that the right of search is not confined to the verification of the nationality of the vessel, but also extends to the object of the voyage, and the nature of the cargo. The sole purpose of the British cruisers is to ascertain whether the vessels they meet with are really American or not. The right asserted has, in truth, no resemblance to the right of search, either in principle or in practice. It is simply a right to satisfy the party who has a legitimate interest in knowing the truth, that the vessel actually is what her colours announce. This right we concede as freely as we exercise. The British cruisers are not instructed to detain American vessels under any circumstances whatever; on the contrary, they are ordered to abstain from all interference with them, be they slavers or otherwise. But where reasonable suspicion exists that the American flag has been abused, for the purpose of covering the vessel of another nation, it would appear scarcely credible, had it not been made manifest by the repeated protestations of their Representative that the Government of the United States, which have stigmatized and abolished the trade itself, should object to the adoption of such means as are indispensably necessary for ascertaining the truth.

Then lower down on the same page he says :

The Undersigned has also expressed his belief that the practice was general, of ascertaining by visit, the real character of every vessel on the high seas, against which there should exist reasonable ground of suspicion. Mr Stevenson denies this; and he asks, what other nation than Great Britain had ever asserted or attempted to exercise, such a right? In answer to this question, the Undersigned can at once refer to the avowed and constant practice of the United States, whose cruisers, especially in the Gulf of Mexico, by the admission of their public journals, are notoriously in the habit of examining all suspicious vessels, whether sailing under the English flag, or any other.

Sir Charles Russell. — Then he says at page 618 :

It is undoubtedly true, that this right may be abused, like every other which is delegated to many and different hands. It is possible that it may be exercised wantonly and vexatiously; and should this be the case, it would not only call for remonstrance, but would justify resentment. This, however, is in the highest degree improbable; and if, in spite of the utmost caution, an error should be committed, and any American vessel should suffer loss or injury, it would be followed by prompt and ample reparation. The Undersigned begs to repeat, that with American vessels, whatever be their destination, British cruisers have no pretension in any manner to interfere. Such vessels must be permitted, if engaged in it, to enjoy a monopoly of this unhallowed Trade; but the British Government will never endure that the fraudulent use of the American flag shall extend the iniquity to other nations by whom it is abhorred, and who have entered into solemn Treaties with this country for its entire suppression.

I will now read the last paragraph of the letter :

Mr Stevenson has said that he had no wish to exempt the fraudulent use of the American flag from detention ; and this being the case the Undersigned is unwilling to believe that a government like that of the United States, professing the same object and animated by the same motives as Great Britain should seriously oppose themselves to every possible mode by which their own desire could be really accomplished.

I think I am justified, Mr President, in saying that although the word “ right ” is used there, it is used in a sense in which even by writers upon law it is sometimes used ; he uses it to indicate something claimed which ought to be allowed, ought to be assented to, by the other Power. He points out that it is not the right of search that he is insisting on, but the right to use means to ascertain whether or not a vessel is fraudulently flying a false flag. This right was resisted by the United States it was resisted, too, by France. That he was speaking of the right in that vaguer or lesser sense of the term, and not of something which he could do under the force of some existing law, is made apparent by the fact that he states that if, the circumstances being sufficiently suspicious to justify visitation, it turns out upon visitation that that suspicion is not warranted, then reparation is to be made to the vessel so visited ; whereas, of course, if it were an absolute right, enforceable against the will of particular nations, you would not find it accompanied by such a provision for reparation.

The matter came up again in 1858 ; and it came up in a way that, if anything can be made interesting in this matter, will make it more or less interesting to the Tribunal. It came up in the House of Lords on the 26th of July 1858, and some very eminent jurists took part in the discussion ; and Lord Lyndhurst, whose position is known, I should think, to all members of the Tribunal — at one time Chief Baron of the Exchequer, afterwards Lord Chancellor, and besides, an important political personage — rises to put a question, of which he had given notice to the Secretary of State for Foreign Affairs. America, I think, has the right to claim him as one amongst many of her distinguished sons. Lord Malmesbury was the Foreign Secretary. Lord Lyndhurst said :

Your Lordships, no doubt, have most of you read a speech which was made by Mr. Dallas, the American Minister, a short time since, at a meeting of his fellow-subjects, to celebrate the anniversary of American Independence. On that occasion the honourable gentleman stated that the question of the right of visiting American vessels in time of peace on the high seas had been finally settled. This is a subject, my Lords, of so much importance and such deep interest that it is material that we should receive a distinct and precise account of the terms on which that settlement is based ; and I have therefore given notice of a question which I intend to propose to my noble the Secretary of State Foreign Affairs, in order that he may give us some explanation on the subject to which I have referred. Many persons — perhaps I ought not to say ‘ many persons ’, but several persons, and those in a high political position — appear to think that that proceeding was not justified, and that in point of fact we have surrendered a most valuable and important right. The

answer which I make to that is, that we have surrendered no right, for that, in point of fact, no right such as that which is contended for has ever existed. We have, my Lords, abandoned the assumption of a right, and in doing so we have, I think, acted justly, prudently and wisely. Now, my Lords, with your permission, I shall proceed to make a few observations upon the general question, and to refer to some of the most eminent authorities on the subject; but I assure you that I should not have troubled you were it not that I think it is of great importance that this question should be distinctly and finally understood and settled. The first proposition which I state is this : That in no writer on international law has that right ever been asserted; and, in the next place, that there is no decision of any Court of Justice having jurisdiction to decide such questions in which that right has been admitted. I wish, in making this assertion, to fortify myself by some authorities; and I cannot quote a higher or a better English authority than that of Lord Stowell, who states distinctly, in the words which I am about to read — in conformity with what I have stated — that no such right has ever been asserted by any competent authority: His words are these :

“ I can find no authority that gives the right of interruption to the navigation of States in amity upon the high seas excepting that which the rights of war give to both belligerents against neutrals.”

At present I am dealing with the assertion that this was a right claimed and exercised, or claimed to be exercised, by Great Britain, and not abandoned. But of course the Tribunal will see that this is a valuable authority, which I need not have to go back upon again, upon what the law itself is.

That is a distinct statement made by that noble and learned Lord. In addition, I beg leave to refer to Wheaton, the eminent American authority on International law, who states the proposition in these terms :

“ It is impossible to show a single passage in any institutional writer on public law, or the judgment of any Court by which that law is administered, which will justify the exercise of such a right on the high seas in time of peace independent of special compact. ”

So that your Lordships perceive that both on this side of the water and in America, by the best authorities and by the highest jurists, that right, in the passages to which I have referred, is controverted instead of being admitted. It has been agitated long between this country on the one side and America on the other. The eminent jurist on the other side of the water makes his statement and assertion; our corresponding authority on this side of the water makes his assertion; and those assertions directly and distinctly agree. For myself, my Lords, I have never been able to discover any principle of law or reason on which that right could be supported. I will refer again to the same high English authority — Lord Stowell — upon this subject, and you shall hear what he emphatically states with respect to it. That distinguished jurist says :

“ No nation can exercise the right of visitation and search on the high seas except on the belligerent claim. No such right has ever been claimed, nor can it be exercised, without the oppression of interrupting and harassing the real and lawful navigation of other countries, for the right, when it exists at all, is universal, and will extend to all countries. If I were to press the consideration further, it would be by stating the gigantic mischiefs which such a claim is likely to produce. ”

I may add that another very high authority — the American Judge Story — in the well-known case of the ‘*Marianna Flora*’, expressed the same opinion in almost the same terms, and in language as emphatic. So here again is a coincidence of authority between the two parties agitating the question — the authority on this side of the water corresponding exactly with the authority on the other. But I do not think it necessary to refer to any cases in support of the cases I am considering; I will refer only to the principle on which the question

rests. What is the rule with respect to the high seas and the navigation of the high seas? All nations are equal on the high seas. Whether they be strong and powerful, or weak and imbecile, all are on a footing of perfect equality. What is the position of a merchant ship on the high seas? A ship is part of the dominion to which she belongs, and what right has the ship of one nation to interfere with the ship of any other nation, where the rights of both parties are equal? The principle is so clear and so distinct that it will not admit of the smallest doubt. I am unwilling on a question of this kind to refer to any arguments of my own, or to any authority which I can possess on the subject; but hear what is said by Lord Stowell with respect to the navigation of the high seas. His language is this:

“ All nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all States meet on a footing of entire equality and independence, no one State or any of its subjects has a right to assume or exercise authority over the subjects of another. ”

That is a confirmation of the doctrine which I have stated, that the principle on which this question is to be decided, is the equality of all nations on the high seas. Admitting this principle, how can it be asserted that the ships of one nation can interfere on any way with the vessels of another? Then, having laid down this principle, the consideration next occurs that difficulties may arise out of frauds which may be practised on the high seas; and it is said that the flag of America may be assumed by another Power to cover the basest of purposes. But how can the act of a third Power, or of the subjects of a third Power, by possibility affect any right existing on the part of the United States? Take this case: By our Treaty with Spain, we have a right to visit and search Spanish vessels with a view to prevent the Slave Trade. But, how can that agreement between us and Spain, by any possibility, affect the rights of America? Clearly in no way at all. But, then, what are our cruisers to do?

He refers a little later to a discussion that took place after the Treaty of Vienna in 1815. I read a little further down in the same speech. He says:

Treaties have been entered into between England and foreign countries, giving the right of visit. But why enter into such treaties, if the right of visiting is a national right, founded on international law? What took place in the year 1815 after the Treaty of Vienna? Lord Castlereagh applied to the French Government to establish some mutual system by which cruisers could visit the vessels of either country: but the Duc de Richelieu replied that France would never consent to a maritime police being established over her own subjects, except by persons belonging to her own country. I think I have now gone far enough to establish the position with which I started, etc.

Then Lord Malmesbury, in reply, indorses categorically and distinctly the opinion of Lord Lyndhurst.

The Tribunal here adjourned for a short time.

The President. — Sir Charles, we are ready to hear you.

Sir Charles Russell. — I was about to read the reply of Lord Malmesbury, who was then the Foreign Secretary. I will only read the part which shows his agreement with the statement of the law as made by Lord Lyndhurst. He says:

It is with great pleasure that we have heard the views of my noble and learned

friend on this important subject, because they conform precisely to the opinion of the Law Officers, of the Crown, whom we thought it our duty to consult —

Lord Hannen may recall that the law officers of the Crown at that time were Sir Fitzroy Kelly, and Sir Hugh Cairns. Lord Malmesbury says :

because they conform precisely to the opinion of the Law Officers of the Crown, whom we thought it our duty to consult before we sent answer to the communications we received from the American Government.

I may say of the then Attorney General, Sir Fitzroy Kelly, that he was afterwards Chief Baron of the Court of Exchequer, and Sir Hugh Cairns, afterwards Lord Cairns, was first of all a Lord Justice of Appeal, and afterwards Lord Chancellor, and a lawyer of great eminence.

Then Lord Malmesbury proceeds :

When we received General Cass's communication —

Which I shall presently read to you as showing the views of the United States upon the question of law.

When we received General Cass' communication, which was addressed to Her Majesty's Government, we immediately consulted the Law Officers of the Crown, and they unanimously asserted that the international law in relation to this question was precisely as it has been just described by my noble and learned friend. Upon that opinion Her Majesty's Government at once acted, and we frankly confessed that we have no legal claim to the right of visit and of search which has hitherto been assumed. Her Majesty's Government therefore abandoned both those claims, but at the same time they placed before the American Government the paramount necessity of agreeing upon the adoption of some instructions perfectly identical in character to be placed in the hands of the officers of both Governments, and, indeed, in the hands of the officers of all maritime nations, by which all Powers should be ruled, so as for the future to avoid all obstruction to commerce, while at the same time the fraudulent use of national flags may be prevented.

Lord Aberdeen joined in this discussion, and you will recollect that it was Lord Aberdeen, when Minister for Foreign Affairs, who conducted the correspondence in 1841, to which I referred in this connection a few minutes ago. Lord Aberdeen says :

I was therefore astonished to hear my noble and learned friend (Lord Lyndhurst) quote the statement of the highly respected American Minister —

that is Mr Dallas —

who is now in this country, to the effect that we had given up frankly and finally the right of visit and search.

Twenty years ago —

Referring back to the period I have mentioned —

Twenty years ago the Government of that day repudiated the assertion of any such right, and therefore what the noble Earl the Secretary of State for Foreign Affairs can have given up I am at a loss to understand. Any such right was given

up then as frankly and finally as it possibly can be given up at this moment. After my noble and learned friend's quoting the high authority of Lord Stowell, it may appear ludicrous in me to quote myself. At the same time, in order to show how the matter stood twenty years ago, I will just quote a note of my own. Though an humble authority, still I was speaking the language of the British Government, and that language was received by the American Government with acquiescence and satisfaction.

Then he gives the passage from his letter which I have read to you already. I will merely read enough of it to remind you what it was. Its words are these :

The Undersigned resigns all pretensions on the part of the British Government to visit and search American vessels in time of peace ; nor is it as American vessels that such vessels are ever visited. But it has been —

and so on.

He then proceeds to repeat at length the letter which I have already read.

Now it will be convenient, I think, if I deal at once with the correspondence which led to this discussion in Parliament; and I invoke that correspondence, not merely because it shows that there was not the assertion as a matter of right at that time, or that if there was at any time such an assertion, it was definitely abandoned. In view of what I have so far read, and still more in view of what I am about to read, I will content myself with expressing my surprise that my learned friend, Mr Phelps, having, as I cannot but think he had, all this matter under his eye, or at least having the opportunity considering it thoroughly, should have written, as he has written in his Argument, at page 161 : “ It has been discussed but never abandoned ”.

The correspondence is correspondence presented to Parliament in 1859, and I read from the Parliamentary papers. I will begin by an important despatch from General Cass to Lord Napier.

General Cass, I believe, was at that time Secretary of State.

Mr Justice Harlan. — In what year?

Sir Charles Russell. — 1859.

Mr Justice Harlan. — He was.

Sir Charles Russell. — It is rather long, but it is important, not merely for its value as an expression of the views of the United States Government, but for the authority which it cites upon the general question of the right of search. On page 5 of this correspondence, he cites an opinion of Lord Stowell in the decision of a case of a French vessel seized upon the coast of Africa : “ No nation can exercise a right of visitation and search upon the common and unappropriated parts of the ocean except upon the belligerent claim ”. That is, of course, the contention that I have for so long been maintaining, that this right of search is a belligerent right and does not exist in time of peace. He then proceeds : —

No nation has the right to force its way to the liberation of Africa by trampling on the independence of other States, on the pretence of an eminent good, by means that are unlawful, or to press forward to a great principle by breaking through other great principles which stand in the way.

Then on page 6 is this emphatic statement :

The United States deny the right of the cruisers of any other power whatever for any purpose whatever to enter their vessels by force in time of peace. No such right is recognized by the law of nations. As Lord Stowell truly said : “ I can find no authority that gives the right of interruption to the navigation of States upon the high seas, except that which the right of war gives to belligerents against neutrals. No nation can exercise a right of visitation and search upon the common and unappropriated parts of the Ocean except upon the belligerent claim ”.

At page 7 he says something which may have a very distinct application to this case :

It is one thing to do a deed avowedly illegal, and excuse it by the attendant circumstances : and it is another and quite a different thing to claim a right of action, and the right also of determining when, and how, and to what extent, it shall be exercised. And this is no barren distinction so far as the interest of this country is involved, but it is closely connected with an object dear to American people — the freedom of their citizens upon the great highway of the world.

So much for General Cass's view. Communications were then opened with other European Powers, with France and Germany among others, and proposals made for the concession of mutual rights by convention, which some of those Powers agreed to in 1862. On page 38 of this Parliamentary paper the suggestion is made, which I think emanated in the first instance from Lord Malmesbury, as a basis of such a Convention.

In virtue of the principle of the immunity of national flags, every merchant vessel navigating the high seas is exempt from all foreign jurisdiction. A ship of war can therefore only visit, detain, arrest and seize those merchant-vessels which she recognizes as being of the same nationality as herself.

Then he proceeds :

The flag being *prima facie* the distinctive sign of the nationality of a vessel, and consequently the proof of the jurisdiction to which she is subject, it is natural that a merchant vessel on finding herself on the high seas in the presence of a man-of-war should hoist her flag to attest her nationality : so soon as the man-of-war has made herself known by hoisting her colours, the merchant vessel ought likewise to hoist hers. If she refuses to hoist her flag it is agreed that she may be summoned to do so, first, by a blank gun, and if that remains without effect, by a second gun shotted, but pointed so as not to strike her. As soon as the merchant vessel by hoisting her flag has established her nationality, the foreign man-of-war can claim no authority over her. The utmost which the latter may do is, in certain cases, to claim the right of speaking with her; that is to say, to ask her to reply to questions addressed to her through a speaking trumpet, but without interfering with her course. When, however, the presumption of nationality resulting from the colours hoisted by a merchant vessel is rendered seriously doubtful by information or by signs of a nature to encourage the belief that the vessel does not belong to the nation whose colours she has assumed, then the foreign man-of-war may have recourse to a verification of the nationality assumed. With this object a boat shall be sent to the suspected vessel which shall have been previously hailed

to announce the intended visit. The verification shall consist of the examination of the papers proving the nationality of the vessel.

These were the proposals which resulted in the Treaty of 1862 upon the subject.

Lord Hannen. — From whom did these proposals emanate?

Sir Charles Russell. — Originally from Lord Malmesbury, I think. It was a communication by Lord Malmesbury, the Foreign secretary, to Lord Napier the British Minister at Washington. This was Lord Malmesbury's proposal as to the identical instructions to be given to the cruisers of these nations.

He says :

The exhibition of these documents is all that can be desired. All enquiry into the nature of the cargo, commercial operations, or, in a word, on any other point but that of nationality, all search or visit of any kind, are absolutely forbidden. The officer entrusted with the verification ought to conduct his proceedings with great discretion and with all courtesy, and leave the vessel as soon as the verification has been effected, offering to enter in the ship's papers the fact and circumstances of the verification, and the motives which determined him to resort to it.

Except in the case of legitimate suspicion of fraud, it ought never otherwise to be necessary for the commander of a man-of-war to go or to send on board a merchant-vessel, so numerous are the signs which, putting colours out of the question, reveal to the eye of a seaman the nationality of a vessel.

Then follows this important provision :

In every case it is clearly understood that the man-of-war that decides on boarding a foreign merchant-vessel does it at her own risk and peril, and remains responsible for all the consequences which may be the result of her act.

The commander of the foreign ship of war who shall have had recourse to this measure ought, in all cases, to make it the subject of a report to his Government, and should explain the reasons of his having so acted. This report, and the reasons which led to the verification, shall be communicated officially to the Government to which the vessel whose colours have been verified shall belong.

Whenever the examination shall not be justified by evident reasons, or shall not have been conducted in a suitable manner, a claim may arise for indemnity.

There then is a communication of a similar kind to the Government of France; and on page 59 there is a communication to Lord Malmesbury by the Duke of Malakoff; and annexed was a draft of instructions proposed to be issued to the Commanders of French ships of war, which are, (though I have not compared them word for word), practically identical with what I have read. I will read sufficient to justify that statement. They begin :

**Instructions proposed to be issued to Commanders
of French Ships of War.**

In consequence of the lapse of the Treaty with Great Britain for the suppression of the Slave Trade, the French and British Governments have felt the necessity of coming to some provisional arrangement with respect to the visit of merchant-vessels suspected of fraudulently assuming the British flag.

The counterpart of that was “ suspected of assuming fraudulently the French flag », and it begins :

Protected by the independence of her national flag, a merchant-vessel navigating the high seas is subject to no foreign jurisdiction, unless by virtue of any Treaty. A man-of-war can therefore only visit, detain, arrest, and seize those merchant-vessels which she recognises as being of the same nationality as herself.

And it proceeds to point in the same way to the flag being a *prima facie* indication, if there is no ground to suspect its honesty, of the nationality of the vessel.

Then it proceeds to say that, if it can be seriously called in question that it is fraudulently assumed, the proceedings mentioned may be taken; and finally, in clause 10 :

In every supposition

that means in every supposed case,

it is thoroughly understood that the captain of a man-of-war who decides upon boarding or sending on board a merchant-vessel, always does it at his own risk and peril, and remains responsible for all the consequences of his act.

If the captain is mistaken, if he finds that the vessel is honestly bearing the flag to which she is entitled, then the nation to which the cruiser belongs must pay if the vessel has been damnified.

The President. — Is not that French draft applicable to time of war?

Sir Charles Russell. — I do not understand it to be so. I understood this was intended to be applicable in time of peace also, that it should be mutually agreed by treaty to allow this invasion of what would have been, without such agreement, the invasion of the territoriality of the country. The object was one which all Governments would apparently have a *prima facie* interest in effecting, namely, the prevention of the fraudulent use of the national flag.

The President. — Were there any negotiations between France and England at that time about that matter.

Sir Charles Russell. — Certainly, what I have just read to you was the communication from the Duke of Malakoff to Lord Malmesbury.

The President. — As it is dated in 1859, I thought it was a provision with reference to the Italian war against Austria.

Sir Charles Russell. — I do not see any trace of it. The real object of the whole of this matter was the desire of those nations that were really in earnest to suppress the slave trade, that flags of nations that were themselves parties to the suppression should not be fraudulently used, or that flags of other nations should not be fraudulently used to cover that obnoxious traffic. I did read it, but probably I did not read distinctly. It is headed “ Instructions proposed to be issued to commanders of French ships of war ”.

The President. — Yes, but it does not apply in time of peace. It does not imply that it is connected with the slave trade negotiations. That is what I did not know.

Sir Charles Russell. — If I may suggest, the first clause rather shows it must have been contemplating a time of peace and not a time of war : —

In consequence of the lapse of Treaty of Great Britain for the suppression of the slave trade the French and British Governments have felt the necessity of coming to some provisional arrangement with respect to the visit of merchant-vessels suspected of fraudulently assuming the British flag.

The President. — Yes, I beg your pardon, I had lost sight of it : you did read it and I remember it now.

Sir Charles Russell. — Then, on page 64, are to be found similar instructions “ about to be issued ” (they had then got to the point of agreement) “ to the Commanders of Cruisers ”. I need not trouble by reading that; I think it follows on the same lines.

There is only one other reference I have to make. The United States come into this arrangement; and I will read General Cass’s communication on the subject. It is the 12th of May, 1859, to Lord Lyons, who was then Minister at Washington. A similar draft had been sent for the consideration of the United States’ Government :

As stated in the draft furnished by Lord Napier, no merchant-vessel navigating the high seas is subject to any foreign jurisdiction. A vessel of war cannot, therefore, visit, detain, arrest, or seize (except under Treaty) any merchant-vessel not recognised as belonging to her own nation. And as a necessary consequence from this rule, it is added in the same draft that in every case it is clearly to be understood that the vessel of war which determines to board a merchant-vessel must do so at her own risk and peril, and must remain responsible for all the consequences which may result from her own act.

Then General Cass proceeds :

These extracts, which fix the responsibility of every Government whose officers interrupt the voyage of a merchant-vessel upon the ocean, suggest very strongly the adoption by each Government of such instructions to its own officers, as will tend to make them appreciate this responsibility, and lead them to observe great caution in acting upon their suspicions against such a vessel. The same extracts supply a very just limitation, also in respect to the cases to which the instructions can, under any circumstances, apply.

And then follows this passage, to which I would ask attention.

Leaving out of view,

says General Cass

the crime of piracy, which happily is now seldom committed, the only instance (except under Treaty) in which a ship of war may be excused in visiting, detaining, arresting, or seizing any merchant-vessel bearing a foreign flag, is when such vessel is, for good and sufficient reasons, believed to belong, in fact, to the country of the visiting ship, —

their own nationals’ ship.

A slaver cannot be detained by a foreign vessel because it is a slaver, unless the

right of detention in such a case has been conferred by the Government to which the foreign vessel belongs. Except so far as it may have parted with it by Treaty, every nation has the exclusive care of its own flag upon the high seas.

The final letter is also a letter from General Cass of the 25th of January, 1859, in which he, referring to the African Slave Trade, says, and quite justly says :

The United States were among the earliest of the nations of the world to denounce the Traffic as unjust and inhuman.

And then he proceeds :

While, however, the President is thus earnestly opposed to the African Slave Trade, and thus determined to give full effect to the laws of the United States for its suppression, he cannot permit himself, in so doing, to concur in any principle, or assent to any practice, which he believes would be inconsistent with that entire immunity of merchant-vessels upon the ocean, in time of peace, for which this Government has always contended, and in whose preservation the commerce of the world has so deep an interest.

This is also the position, I am gratified to observe, of the Government of France. France, like the United States, recognises no right of search or visit upon the high seas, except in time of war. France, like the United States, holds, in the language of your Memorandum, that an "armed vessel cannot visit, detain, arrest, or seize any but such merchant-vessels as it ascertains to belong to the same nation to which the armed vessel itself belongs." France, like the United States, holds further, that while cases may exist of a fraudulent assumption of a flag, the verification of such a case must be made at the peril of the party making it, or in the words of your Memorandum, "under all circumstances it is well understood that the armed vessel that may determine to board a foreign merchant-vessel, does so in every instance at its own risk and peril, and stands responsible for all the consequences which may follow the act."

While thus recognizing the immunity of merchant-vessels on the ocean, and the grave responsibility which is assumed by a ship of war when she boards a foreign ship in order to verify its flag, your Memorandum suggests some interesting views in respect to the caution with which such a verification should be pursued, and such a responsibility exercised.

I do not understand that the French Government desires to limit this responsibility, or to change in any way that rule of international law by which in time of peace an honest merchantman is protected on the ocean, from any visit, detention, or search whatever.

Now I have come to the end of that correspondence, and I will not more pointedly refer to the inaccuracies, as I submit I have now shown them to be, of the United States Argument than to say this, that this correspondence clearly shows that whatever assertion was made in the first instance was not an assertion of a general right of visitation and search, but was a right put forward as a right undoubted, I admit, by Lord Palmerston, who used that language, of visitation for the purpose of establishing the nationality of the ship : that from the assertion of that right, in the emphatic language which I read earlier, he retired : and that that view is expressly disclaimed by the responsible minister of the Crown in his place in Parliament, acting upon the opinion of the Law Officers of the day, and reiterated and communicated in the correspondence which I have just read.

Lord Hannen. — What did those proposals result in?

Sir Charles Russell. — In a Treaty of 1862. I thought I had it here to refer to it, but I have not, my Lord.

Lord Hannen. — I only wanted a general statement to what extent they were adopted.

Sir Charles Russell. — Shortly put it is this : a Treaty was entered into between the United States and Great Britain, by which was mutually conceded to the ships of war of each Power the right under the general conditions I have read to search vessels bearing the flag of the other, in order to ascertain if it were the true flag. The Treaty, was confined in its operation to the waters in which the West African slave-trade would have been carried on.

General Foster. — In 1862?

Sir Charles Russell. — I think so.

The President. — And I think in the Treaty between France and England that not even so much as that was conceded.

Sir Charles Russell. — No, not till a later period. France has always been very staunch in denying any right of interference with its ships upon the high seas, even under these extreme circumstances as they were considered. She always strenuously denied the right in any form, and even as a matter of agreement she was very slow and chary in altering the position she assumed.

I now pass on to another matter. You will see at the end of page 162 of the Argument an innocent little passage, as it looks there, taken from Azuni, which, if I did not explain the context, might lead to a very wrong conclusion indeed as to its meaning.

Azuni carries the principle still further, and holds that even national rights should yield to the rights of another nation, when the consequences to the latter are the more important.

A very broad proposition indeed.

When the perfect right of one nation clashes with the perfect right of another, reason, justice, and humanity require that in such case the one that will experience the least damage should yield to the other.

Well, if it has any application to this case that would mean that it is more important to the United States to keep to the industry of killing seals on the Pribilof Islands than it can be to Canadian fishermen to pursue pelagic sealing on the high seas, and therefore pelagic sealers should on that ground give way.

But I cannot think that my learned friend Mr Phelps had leisure to read the context, or he would not have cited this passage, because when the context is read, his citation is, to say the least, amusing. My learned friend, Mr Box, has been good enough to summarize the whole passage for me, and, I think, correctly. I have Azuni here, and I will hand it to my learned friend. It is Azuni, vol. 1, page 226. This is the *résumé* of

the full passage and context, and my learned friends will see the point he makes — the illustration he gives of the clashing of those rights.

Marquis Venosta. — Azuni was an Italian.

Sir Charles Russell. — Yes he was an Italian writer on the “ *Droit maritime de l’Europe* ”.

Mr Phelps. — I cited from the English translation, this is the French.

Sir Richard Webster. — That may be so, but still his words are there.

Mr Phelps. — Yes.

Sir Charles Russell. — My criticism is not one that turns upon verbal translation. The translation that my learned friend has used is quite accurate so far as the translation goes, but it is the context I want to call attention to to show what the particular passage means.

It is in nature a sacred and inviolable law which, in the conflict of two equal rights, authorises the suspension of the one of which the interruption produces a less damage, reparable in some manner either more easily or with less expense.

These are the instances, and the Tribunal will at once see that this is my only point about it.

The instances given are :

Jettison : that is to say, a ship is in peril, the whole adventure is in peril, and the right of the owner of particular goods, which happen to be on the top of the cargo and under the hatch way, must give way if the jettison of that cargo is necessary for the preservation of the greater portion of the whole adventure, or of the lives of those on board.

Demolition of a house to prevent a fire from spreading to one’s own : Like the case which frequently happens in the great prairies of America where it is I believe thought perfectly justifiable if a fire is raging, to cut down the intervening vegetation, which belongs to somebody else, to prevent that fire spreading and causing more widely spread devastation.

So, sinking a burning ship to prevent the fire from spreading to its neighbours.

Taking one’s neighbour’s timber to raise the bank of a stream which is on the point of overflowing.

In extreme scarcity, taking ship-loads of food to supply the nation which is in want. That is of course a very extreme case.

In all these cases says Azuni it is enough to repair the damage in order to prevent complaint.

This violation of right is commanded by the imperious law of necessity which, in this conflict, chooses that one avoid the imminent, irreparable, and greater evil, of the death or ruin of a great number of individuals, equivalent compensation being granted.

I think that will show that the particular passage is not of any value upon the subject which we are discussing.

I pass on now to one of a series of illustrations given by my learned friend, which, of course, he would not have given if he had not satisfied his own mind that they were in some sense analogies. But analogies are

like metaphors. They are very difficult to manage; and indeed an analogy brings you but a very short way, and that not very satisfactory either, upon your journey, because you have first to establish that the analogy is really a perfect analogy, and when you have got to that point it becomes a question *idem per idem*, so that you are remitted back to the original case, which was your crux and difficulty in the matter.

But I must notice these cases. The first is on the top of page 176 of the argument :

Suppose that some method of explosive destruction should be discovered by which vessels on the seas adjacent to the Newfoundland coast outside of the jurisdictional line could, with profit to themselves, destroy all the fish that resort to those coasts, and so put an end to the whole fishing industry upon which their inhabitants so largely depend. Would this be a business that would be held justifiable as a part of the freedom of the sea? Although the fish are admitted to be purely *feræ naturæ*, and the general right of fishing in the open sea outside of certain limits is not denied.

Well, I would first ask : Is there any analogy between that case and the case we are discussing, if that can be called the exercise of the right of fishing at all? As I read the case, I fail to see where the profit comes in, because he says : “ Could, with profit to themselves, destroy all the fish ”.

Mr Phelps. — Yes.

Sir Charles Russell. — And gather them — perhaps that is understood?

Mr Phelps. — Certainly.

Sir Charles Russell. — “ Destroy all the fish and gather them ”. I have, in the first instance, to say that it is a little extravagant to compare that which is not a known or recognized form of fishing with the pursuit of seals pelagically, which is [the oldest form of the pursuit of seals known in the history of the pursuit itself.

Next, I say — (I think Senator Morgan was good enough to put a question to me the other day on the subject) — if in truth the case were that such wholesale destruction were resorted to for disproportionate results, it would be very strong evidence indeed to go to any Tribunal to determine whether that act was not itself done maliciously, and with the intent to injure those who had the common right of fishing.

Now the next case that is put is this :

An Atlantic cable has been laid between America and Great Britain, the operation of which is important to those countries and to the world. Suppose some method of deep-sea fishing or marine exploration should be invented, profitable to those engaged in it, but which should interrupt the operation of the cable and perhaps endanger its existence. Would those nations be powerless to defend themselves against such consequences, because the act is perpetrated upon the high sea?

Well, one would require to know the circumstances intended to be contemplated by that paragraph. For instance: Was the injury to the cable done accidentally in the lawful pursuit of a known mode of fishing,

because, if so done, I should say there was no remedy, and no cause of complaint. If it were done gratuitously and maliciously, I should have thought there was. I am not now troubling myself with the question of jurisdiction or the particular Court in which the cause of action might be tried — I am speaking of it on broad and general principles, assuming no question of venue, or of technical difficulty, to arise. But in truth all this matter (because of the uncertainty of what the rights would be juridically considered in relation to such a matter) has been already dealt with, with the co-operative assent of, I may say, all the civilized Powers in the World. I proceed to shew how it has been dealt with.

By the Treaty of the 14th March 1884, — I will mention presently what nations are parties to it — wilful and negligent interruptions of telegraphic communication are made punishable without prejudice to civil action (Art. 2); offenders are to be tried in the Courts of the country of their own ship or nation (Art. 8); and when there is reason to believe that a ship has infringed the Treaty, the cruisers of the contracting Parties may require production from the master of “ *pièces officielles* ” proving its nationality (Art. 10).

Now I have the Treaty before me. The Powers who are parties to it are. — The Queen of the United Kingdom of Great Britain and Ireland; the Emperor of Germany; the King of Prussia; the President of the Argentine Confederation; the Emperor of Austria; the King of Bohemia; the King of the Belgians; the Emperor of Brazil; the President of the Republic of Costa Rica; the King of Denmark; the President of the Dominican Republic; the King of Spain; the President of the United States of America; the President of the States of Columbia; the President of the French Republic; the President of the Republic of Guatemala; the King of the Hellènes; the King of Italy; the King of the Ottomans; the King of the Netherlands; The Grand-Duke of Luxembourg; the Shah of Persia; the King of Portugal; the King of Roumania; the Emperor of all the Russias; the President of the Republic of Salvador; the King of Servia; the King of Sweden and Norway; the President of the Oriental Republic of Uruguay. I cannot suggest any great Power that is not a party to this Convention, and therefore the case which my friend here suggests as a difficulty is a case which these Powers have recognized as one which might not be perhaps adequately or properly dealt with under existing international law, and therefore they have made it a matter of express compact for the benefit of all the Nations.

Now the next case on page 176, to which my friend refers, is one highly creditable to my friend's ingenuity, but does it help the Tribunal?

My friend says :

If a light-house were erected by a nation in waters outside of the three-mile line, for the benefit of its own commerce and that of the world,

that is the first “ if ”

if some pursuit for gain on the adjacent high sea should be discovered which would obscure the light or endanger the light-house or the lives of its inmates, would that Government be defenseless?

Well, it is a very difficult case to realize what is really meant by that. For instance, I cannot quite realize how a pursuit of fishing on the high seas could, except by some stretch of imagination of which I am not capable, require the obscurity of the light of a light-house, or endanger the light-house or the lives of its inmates; but I wish to point out that I think my friend has, for the moment forgotten, that if a light-house is built upon a rock or upon piles driven into the bed of the sea, it becomes, as far as that light-house is concerned, part of the territory of the nation which has erected it, and, as part of the territory of the nation which has erected it, it has, incident to it, all the rights that belong to the protection of territory — no more and no less.

Mr Phelps. — If it should be five miles out?

Sir Charles Russell. — Certainly, undoubtedly. The most important light-houses in the world are outside the 3 mile limit.

Lord Hannen. — The great Eddystone Light-house, 14 miles off the land, is built on the bed of a rock.

Sir Charles Russell. — That point has never been doubted; and if it were there is ample authority to support it. The right to acquire by the construction of a light-house on a rock in mid-ocean a territorial right in respect of the space so occupied is undoubted; and therefore I answer my friend's case by saying that ordinary territorial law would apply to it — there is no reason why any different territorial law should apply.

Then my friend proceeds :

Lord Chief Justice Cockburn answers this inquiry in the case of *Queen v. Keyn* above cited (p. 198) when he declares that such encroachments upon the high sea would form a part of the defence of a country, and “ come within the principle that a nation may do what is necessary for the protection of its own territory. ”

The passage which I conceive my friend was referring to, is a passage which, like that from Azuni, requires, in order to understand it, the whole passage to be read. I am reading now from page 58 of a printed report of the Judgment of Lord Chief Justice Cockburn.

It does not appear to me that the argument for the prosecution is advanced by reference to encroachments on the sea, in the way of harbours, piers, break-waters, lighthouses, and the like, even when projected into the open sea, or of forts erected in it, as is the case in the Solent. Where the sea, or the bed on which it rests, can be physically occupied permanently, it may be made subject to occupation in the same manner as unoccupied territory. In point of fact, such encroachments are generally made for the benefit of the navigation; and are therefore readily acquiesced in. Or they are for the purposes of defence, and come within the principle that a nation may do what is necessary for the protection of its own territory. Whether if an encroachment on the sea were such as to obstruct the navigation, to the ships of other nations, it would not amount to a just cause of complaint, as inconsistent with international rights, might, if the case arose, be deserving of serious consideration. That such encroachments are occasionally made seems to

me to fall very far short of establishing such an exclusive property in the littoral sea as that, in the absence of legislation, it can be treated, to all intents and purposes, as part of the realm.

In other words, it defends and justifies the taking possession of a certain part of the sea, and permanently occupying it for the purpose of erecting light-houses.

Of course the President and other members of the Tribunal are aware that by the invention of a blind gentleman of the name of Mitchell, who invented the screw-pile arrangement, these piles are driven down in great depths of the sea, and upon these piles in many places, where there is no rock as a more secure resting place, many light-houses throughout the world are supported.

I think I have got to the end of the illustrations and of the cases cited by my learned friend with the exception of one set of cases, which may be called appeals in the nature of *argumentum ad hominem*, to which I have already incidentally referred namely : cases as to which there is a supposed analogy with the rights that the United States are here contending for ; a supposed analogy conceived to be found in certain legislation of Great Britain, especially legislation in relation to her colonies and by her colonies. There is also a case of *Church v. Hubbard*, and some cases cognate to it, which I shall have a little later to refer to.

But I shall try to answer on this occasion the question addressed to me by the learned President before the adjournment as to the view of the British Government of the Greytown incident. You recollect, Sir, that you were good enough to address that inquiry to me.

The President. — Yes, Sir Charles.

Sir Charles Russell. — I am now able to answer the inquiry. The matter became a subject of discussion in the House of Commons on the 19th of June, 1857, Lord Palmerston being then Prime Minister. In order to appreciate what follows, it is well to observe that the way in which the question arose was this : That in the bombardment of Greytown loss had been sustained by private persons, some of British nationality, some of French, and some of other nationalities ; and the question was whether in the circumstances of that bombardment of Greytown, and according to principles of international law, the Governments of those nationals would be justified in pressing upon the United States claims for compensation. The short answer will be found in the statement that they were regarded as acts of belligerent hostility, and that in the opinion of the Law Officers — I will read the opinion of the Law Officer of the day, a man of great eminence — it fell within the principle that innocent neutrals who suffer by the operation of belligerent acts in time of belligerency, had no claims which their Governments could press diplomatically. There were as usual in all cases of legislative bodies of any kind, I may say, and certainly of a popular character, diverse views, and persons were to be found to reproach the Government of the day

for not having been more thorough and more strenuous in insisting that there should be compensation made. For instance, I see that Mr Roebuck, an eminent politician of that day, makes a more or less vehement attack upon Lord Palmerston because he has not done more; and Mr Disraeli, as he then was, Lord Beaconsfield, as he afterwards became, rather joins in that; but Lord Russell, who was at that time not in the Government of Lord Palmerston (and indeed, as some of you will recollect was on anything but good terms with Lord Palmerston, in 1857), supports the Government. What the Attorney General says is this: — the reference to Hansard is Third Series, vol. CXLVI, page 47.

(The Attorney-General, I ought to say, because it gives some weight to his opinion, was Sir Richard Bethel, afterwards Lord Westbury, Lord Chancellor of England.)

The Attorney General assured the hon. and learned member for Sheffield (Mr Roebuck) and the hon. Gentleman who had just sat down, that if the law advisers of the Crown had found that, compatibly with the international law of Europe, satisfaction could have been demanded from America for the losses sustained by British subjects at Greytown, they would unquestionably have pressed upon the Government advice to that effect. The opinion they arrived at was arrived at unwillingly and reluctantly by the law advisers of the Crown. But France also was concerned in this affair, and was she to be accused of truckling to America? In France they were obliged to come to the same conclusion, and France therefore as well as England had abstained from pressing any demand for satisfaction that could not legally be obtained. The experience of the proceedings between this country and America which he had had as law adviser of the Crown led him to a conclusion the reverse of that arrived at by the hon. Gentleman who had just sat down. If America were asked her opinion, she would say that she had reason to complain again and again of the strictness with which the law of this country and the principles of international law had been enforced against her. He defied the hon. Gentleman to point to a single instance in which England had given up a legal claim to satisfaction. Every jurist admitted that in a case like that of the Greytown bombardment no compensation could be enforced for the losses sustained. The principle which governed such cases was, that the citizens of foreign States who resided within the arena of war had no right to demand compensation from either belligerents, for the losses or injuries they sustained. As an instance of this doctrine he would beg the hon. Gentleman to call to mind the case of Copenhagen and the bombardment of other places.

I care not whether that was right or whether that was wrong. That was the view taken by the Law Officer, that it was a case of loss within the arena of war.

Now I come to the argument from the analogy of legislation in England which is relied upon by my learned friends. If I may be permitted to refer the Arbitrators to a convenient reference which will save the need of their constantly changing their books of reference, I would ask them to refer to the *British Argument*, at page 39.

Now may I make — without making it I hope in any acrimonious spirit — this one comment in reference to this legislation which I am about to call attention to. The facts are, with sufficient fullness and correctness in each of these cases, set out in the *British Counter Case*;

and yet we have in the argument of the United States these cases reproduced as if they had not been explained, and the whole statement of explanation discarded as if it had not been made at all.

The President. — Perhaps that may be accounted for by chronology: that the Argument had been made before the Counter Case was delivered.

Sir Charles Russell. — There was an extension of time; but if my friend says so I will accept that.

Mr Phelps. — Certainly not. We stand upon the Argument without any reference to chronology, and we expect to sustain it.

Sir Charles Russell. — Then my friend will not accept the shield, Mr President, which you are good enough graciously to offer.

Mr Justice Harlan. — What is your point? that the American Argument should have referred to the Counter Case and not reproduced the statutes in it?

Sir Charles Russell. — My argument is — if it deserves to be designated by the name of argument — my observation is that whereas in our Counter Case we had stated the facts as they are —

Mr Phelps. — As you claim them.

Sir Charles Russell. — *The facts as they are* as to this legislation: in the United States Argument that statement of the *facts as they are* is entirely disregarded as if it had not been made; the whole statement is ignored. It is not an important matter; but I think it is fitting to make some reference to it because one would have expected that when in the British Counter Case the explanations were given, some notice would be taken of those explanations, and if they were incorrect, that the points in which they were incorrect would have been pointed out.

On page of our Argument 39 we state that :

The claim of the United States to rest their case on the precedents of the laws of other nations forms a distinct branch of their case, and requires to be specially considered.

Such laws are referred to by the United States, for three objects :

1. To endeavour to prove a uniform practice of nations to protect seal life from destruction by means of extra-territorial legislation.

2. To endeavour to show a uniform practice of nations of extending the provisions of their fishery laws beyond the 3-mile limit; and of making these provisions applicable to foreigners.

3. To show that other examples of extra-territorial jurisdiction are to be found in the laws of other nations.

The deductions desired to be drawn by the United States from the examples cited are :

From 1. That the United States' law under which British vessels have been seized is justified by the laws of other nations for the protection of seals.

From 2. That the law is justified by analogy to the fishery laws of other nations; and.

That the application of this law to foreigners beyond the 3 mile-limit is also justified by example and analogy.

From 3. That the law, and more especially in its application to foreigners beyond the 3-mile limit, is further justified by analogy of other extra-territorial laws not dealing with fisheries.

Then the scheme of consideration of these cases is explained :

It is proposed to demonstrate in the following Argument that these premises are not well founded, and that the position assumed by the United States is untenable.

With regard to the argument from the practice of other nations, or from analogy to the practice of other nations, it is submitted that the following propositions can alone be maintained.

To warrant any exceptional departure from the principles commonly accepted by all nations as part of the law of nations, it is essential that there should be an agreement between all :

1. As to the sufficiency of the causes calling for such exceptional legislation.

2. As to the means for remedying such causes, i. e., as to the purport of such legislation.

This follows from the fundamental principle on which the law of nations rests, viz., consent of nations.

This subject has already been dealt with, but it is necessary to examine categorically the examples of extra-territorial legislation adduced by the United States in order to show that they utterly fail to support the argument for which they are cited.

The first citations are in support of the proposition that seal life is protected by extra-territorial law of other countries. The instances given are the Falkland Islands, New Zealand, Cape of Good Hope, Canada and Newfoundland.

Those are British territories. These are followed by Sweden and Norway, Russia, Germany and Holland, with reference to the Greenland or Jan Mayen fisheries; the other countries cited are Russia, Uruguay, Chile, Argentine Republic and Japan.

I cannot do better than quote in substance what is said here.

You will observe, Mr President, that in some of these passages some of the words are printed in Italics. I think it will be found in some of these cases that they are so printed in the United States Case or Counter Case or in the Appendix. Now as regards the Falkland Islands :

The Act providing a close time for seals is No. 4 of 1881. It recites that the seal fishery of the islands was once a source of profit to the colonists, but has been exhausted by indiscriminate and wasteful fishing, and that it is desirable to revive and protect this industry by the establishment of a close time *within the limits of this Colony and its dependencies*.

The Statute then enacts that a close time shall be observed *within the limits of this Colony and its dependencies* from the 1st October to the 1st April.

The words italicised have a special meaning.

And here I call attention to a principle which you will at once recognize, the difference between the powers of legislation of what may be called a supreme body, and the powers of legislation which may be exercised by a subordinate Legislature, which is the creation of a supreme Legislature. For instance, the Parliament of Westminster can legislate for the whole of the Queen's dominions, even for those portions of the dominions to which the Queen has given constitutional Government, and which has its own powers of legislation; and it can also legislate for the subjects of the Queen all the world over. But colonial Legislatures can legislate

effectively only for and within the limit of their own actual territory. They cannot extend the effect of their legislation beyond that territory, or even to bind the subjects of the Queen beyond that territory.

This illustration from the Falkland Islands is referred to on page 168 of the United States Argument, the third paragraph from the top :

An ordinance of the Falkland Islands, passed in 1881, established a close season for the islands and the surrounding waters, from October to April in each year. Two of the islands lie 28 miles apart, and this regulation is enforced in the open sea lying between them.

You will observe that after that statement my learned friend gives, as it were, authorities for the statement, “ Report of U. S. Fish Commission ” — I do not know what that is, or where it is — “ affidavit of Capt. Budington ; Case of the United States, Appendix, Vol. 1, p. 435 ” ; but for my purpose I will read from page 221 of the United States Case. Having set out this ordinance at the bottom of that page, they go on to say :

Capt. Budington

This is the expert in law —

— an experienced navigator and seal hunter in southern waters, visited that region in January, 1892, and he states, under oath, that the ordinance of 1881 is enforced in the sea surrounding those islands outside the three-mile limit, and that it would be deemed a violation of the law to take seals during the close season between the Falkland Islands and Beauchene Island, twenty eight miles distant.

When you read the affidavit, if you will bear in mind the words I have just read, I think you will find that it has been put a little too strongly in the Case ; because Budington’s affidavit, which is in another volume — Volume 2 of the Appendix, page 593 — says, under the head of the Falkland Islands :

At one time these islands were very abundant in seal life, but excessive and indiscriminate killing has nearly annihilated them.

That is not the fact I am upon.

This fact was recognized by the Government of the islands, which passed an ordinance in 1881 establishing a close season from October to April for the islands and the seas adjacent thereto. My understanding of this ordinance was that the Government would seize any vessel taking seals close to or within 15 or 20 miles of the islands.

So we have got this gentleman, who may be a very good mariner, but hardly an expert in law, to say that his “ understanding ” of this ordinance was that the Government would seize any vessel taking seals close to or within 15 or 20 miles of the islands. ”

Mr Foster. — The affidavit shows he was a seal hunter returned from the South Seas.

Sir Charles Russell. — And he may go back to the South Seas, so far as I concerned. I am dealing with him as an authority on this subject, as a lawyer. I am pointing out that what he says in this affidavit is not

that he was ever stopped, not that he heard of anybody that ever was stopped, not that he heard anybody said that anybody ever was stopped, but that this hunter, who had returned from the South Seas — what recommendation that is to him, I do not know — says :

My understanding of this ordinance was that the Government would seize any vessel taking seals close to or within 15 or 20 miles of the islands. I understood this ordinance was passed on the ground that the seal resorting to these islands was the property of the Government and therefore it had a right to protect them every where. The Government, however, gave licences to certain parties..... to take seals during the close season.

Senator Morgan. — Sir Charles, are all of those legislative acts of the colonies repealable by the Parliament of Great Britain?

Sir Charles Russell. — The machinery is this. The assent of the Crown is absolutely necessary to give effect to any act in the nature of a legislative act by a Colony, whether it is a colony with a constitution or a Crown Colony. That is the way it stands. It would be quite within the powers of Parliament to pass legislation which should gainsay this, if it chose to do so.

Senator Morgan. — Of any act of the Canadian Parliament, for instance?

Sir Charles Russell. — Oh certainly, if it chose to do so. The Imperial Parliament, which, it should be borne in mind, has created the Legislature of Canada, for instance, has the power to modify that creation, and if necessary to undo it.

Senator Morgan.. — We have a system somewhat akin to it in the United States. The acts of the territorial Legislatures are considered as Acts of Congress, unless Congress intervenes to repeal or modify them, so that they become the supreme authority of the Government of the United States. What is done by the colony is done by the Crown.

The President. — Unless it is cancelled?

Senator Morgan. — Yes.

Sir Charles Russell. — It is to me a most painful thing to have to refer you to so many books, but it seems to be absolutely necessary.

The President. — Could you not refer us directly to the statutes of these Colonies?

Sir Charles Russell. — That is what I am going to do. You will find them in Volume 1, page 435, of the United States Appendix.

Mr Foster. — We print all those statutes.

Sir Charles Russell. — Yes.

Whereas the seal fishery of these islands, which was at one time a source of profit and advantage to the colonists, has been exhausted by indiscriminate and wasteful fishing, and it is desirable to revive and protect this industry by the establishment of a close time, during which it shall be unlawful to kill or capture seals within the limits of this colony and its dependencies :

Be it therefore enacted by the Governor of the Falkland Islands and their dependencies, with the advice and consent of the Legislative Council thereof, as follows :

1. No person shall kill or capture, or attempt to kill or capture, any seal within

the limits of this colony and its dependencies, between the days hereinafter mentioned (which interval is hereinafter referred to as the close season); that is to say, between the first day of October and the first day of April following, both inclusive; and any person acting in contravention of this section shall forfeit any seals killed or captured by him and shall in addition thereto incur a penalty not exceeding one hundred pounds, and a further penalty of five pounds in respect of every seal so killed or captured.

2. Any owner or master or other person in charge of any ship or vessel who shall permit such ship or vessel to be employed in killing or capturing seals, or who shall permit any person belonging to such ship or vessel to be employed in killing or capturing as aforesaid, during the close season, shall forfeit any seals so killed or captured and in addition thereto shall be liable to a penalty not exceeding three hundred pounds for each offence.

3. Every offence under this ordinance may be prosecuted and every penalty under this ordinance may be recovered before the police magistrate or any two justices of the peace in a summary manner, or by action in the supreme court of this colony, together with full costs of suit : *Provided*, that the penalty imposed by the police magistrate or two justices shall not exceed one hundred pounds, exclusive of costs.

One-half of every penalty recovered under this ordinance shall be paid to the person who prosecuted the offence or sued for such penalty.

All fines, forfeitures, and penalties recovered under this ordinance, where not otherwise hereinbefore provided, shall be to Her Majesty, her heirs, and successors, and shall be paid to the treasurer for the use of the government of this colony.

For all purposes of and incidental to the trial and punishment of any person accused of any offence under this ordinance and the proceedings and matters preliminary and incidental to and consequential on his trial and punishment, and for all purposes of and incidental to the jurisdiction of any court or of any constable or officer with reference to such offence, the offence shall be deemed to have been committed either in the place in which it was actually committed or in any place in which the offender may for the time being be found.

4. Where the owner or master of a ship or vessel is adjudged to pay a penalty for an offence under this ordinance the court may, in addition to any other power they may have for the purpose of compelling payment of such penalty, direct the same to be levied by distress or arrestment and sale of the said ship or vessel and her tackle.

5. In this ordinance the expression " seal " means the " fur seal ", the " sea otter, " the " hair seal, " the " sea elephant, " the " sea leopard ", and the " sea dog, " and includes any animal of the seal kind which may be found within the limits of this colony and its dependencies.

Senator Morgan. — Now, Sir Charles, before you close this subject, I wish to ask you a question, for information, merely. I wish to know whether the British Parliament has repealed any of these Acts of any of the Colonial Legislatures, or modified them, having reference to protection of seal life?

Sir Charles Russell. — I am not aware of a such a thing having happened. There is not one that applies.

Senator Morgan. — I am not speaking about where they apply. I want to know whether the British Government is responsible, as a Government, in its legislation, for these Acts.

Sir Charles Russell. — So far as the responsibility means that it has not interfered —

Senator Morgan. — That is what I mean.

Sir Charles Russell. — With the legislative action within the constitutional rights of the particular dependency, whether a Crown Colony or self-governing Colony, I think that is correct.

Senator Morgan. — No question has been made of the power of the Colonies to pass the respective laws that they have passed?

Sir Charles Russell. — As far as I am aware, no. And also, I add to that, as far as I am aware, there is no reason why any question should be raised.

Senator Morgan. — Perhaps not. I only wanted to know what the fact was.

Sir Charles Russell. — As far as I know, that is the fact; but if you can give me any particulars in any precise case, I shall be glad to look it up.

Senator Morgan. — I do not refer to any case at all. I merely wanted to know whether the Tribunal of Arbitration were to consider these statutes upon the colonial statute books as being statutes enacted by the consent of the British Crown?

Sir Charles Russell. — I have stated what the facts are, Sir, and they will speak for themselves. I think I have already answered the question.

Senator Morgan. — I supposed that you could tell me what the fact is in regard to it.

Sir Charles Russell. — That legislation, so far as I am aware — I am proceeding to examine it in detail — is all strictly limited according to, and within, the proper constitutional lines. It is territorial legislation and territorial legislation only.

The President. — But I believe Senator Morgan is right in saying that as long as it has not been objected to by the Crown of England, the Crown of England is held responsible for it. You have just stated that, I think.

Sir Charles Russell. — I think you probably, Sir, for a moment were otherwise engaged. I pointed out that as regards a British Colony, whether it has no constitution, and therefore no legislative assembly of its own, or whether it has a constitution, the assent of the Queen has to be given to such legislation before it can become operative. In either case, it is given through the Governor of the particular Colony, as in the case of Canada. The Crown moreover, even after assent has been given to a legislative act by the Governor in the name of the Queen, and it has become law, has the power of disallowing any colonial Act, a power which must however be exercised usually within a fixed period of time. Great Britain has assented, and in that sense, is clearly responsible for the legislation.

Lord Hannen. — They are all either with the consent, or without the dissent, of the English Government?

Sir Charles Russell. — Quite so. I rather preferred to answer the question by stating what the actual facts were, which I have done. I think at the moment, sir, you were engaged, when I was explaining it to Senator Morgan.

The President. — I believe that answers Senator Morgan's question.

Sir Charles Russell. — I think it does. I intended it to be an answer, and I think the Senator so understood.

Senator Morgan. — I understand this : that without the dissent of the Queen or the Government of Great Britain, in the case of Crown Colonies, their Statutes stand as if they had been enacted by Parliament, and that that is the same rule also in regard to what you call the constitutional Colonies : there being no dissent, the law is as if enacted by Parliament in legal effect, of course.

Sir Charles Russell. — Now I wish if I may to conclude this case of the Falkland Islands, before the Court rises, and I will not repeat my observations which were more or less in the nature of a complaint : but this is what we say in our Counter Case, which I understand my learned friend had before him when his Argument was prepared. This is on page 87.

In order to suggest that the provisions of this Ordinance are extended to non-territorial waters, Captain Budington, a navigator and seal-hunter, is quoted as an authority for the statement “ under oath ” that this Ordinance is enforced outside the 3-mile limit.

It will be found, however, on reference to his affidavit, that Captain Budington only swears as to what was his “ understanding ” of the Ordinance ; and as to any instance of the enforcement of this law against foreigners outside the ordinary limit of jurisdiction, he offers no evidence whatever.

The Ordinance, with reference to the close season thereby established, enacts :

And it repeats the section, which is confined in its operation to “ the limits of this Colony and its dependencies ”.

This is the statement put in our Counter Case and before the Argument was prepared.

The terms of the Ordinance are expressly confined to the limits of the Colony and at no time since the Falkland Islands have belonged to Great Britain, whether before or after the making of the Ordinance in question, has any attempt been made to interfere with the capture of seals outside the ordinary territorial waters. This fact is noted in the British Commissioners' Report.

There is a distinct statement. First of all, our position is this, that the law itself is in fact strictly limited territorially ; and secondly, that, in fact, it has never been asserted or put in force against a foreigner outside the 3-mile limit.

Senator Morgan. — In regard to these colonial Acts in regard to seals, do any of them make leases of the right to take seals?

Sir Charles Russell. — I am not aware that they do. They grant what might be called hunting licenses.

Senator Morgan. — Yes.

Lord Hannen. — What is the page of the British Commissioner's Report?

Sir Richard Webster. — It is referred to on page 87, my Lord, of the Counter Case, and it is quoted at page 156.

Lord Hannen. — But what is the passage at page 156 of the British Commissioners' Report that it is referred to?

The President. — Are you sure that it is the Behring Sea Commissioners?

Sir Charles Russell. — Yes, I will give you the passage.

Mr Justice Harlan. — I suppose it is in reply to what Felton says in answer to question 3.

Sir Richard Webster. — Yes, I think it is.

Sir Charles Russell. — That is, of course, a statement of fact that can be challenged if not correct.

Mr Phelps. — What is the statement of fact?

Sir Charles Russell. — I have just read it at page 87 of the Case.

Mr Phelps. — But I mean in the British Commissioners' Report.

The President. — Yes, the evidence of it.

Sir Charles Russell. — I must be allowed to state it in my own way. There is the statement of fact which is capable of being challenged if not true. Now I will show the reference to the British Commissioners' Report.

There is set out on page 154 a circular letter of enquiry which they addressed to, among other Colonies, the Falkland Islands : it is as follows :

The Department of Fisheries of the Dominion of Canada, in connection with questions relating to the fur-seal fisheries of the North Pacific, is desirous of obtaining all possible information relating to the fur-seal fisheries of the Southern Hemisphere. The southern fur-seal, or "sea-bear" (of the family of eared seals, or *Otaridae*), is known to have formed the object of an important industry in the early part of the present century, but the islands on which it once abounded are now reported, and believed to be, almost entirely depleted of seals. As the habits and life-history of the fur-seal of the North Pacific appear to be closely similar to those of the allied seals of the Southern Hemisphere, it is thought probable that the history of the decline of the southern fisheries may afford some facts having a direct bearing on the fur-seal fisheries of the North Pacific, and may serve to indicate a proper mode of protection to be accorded to these fisheries, if such should be found necessary.

In this connection, it would be of particular interest to know for each of the seal islands or sealing-grounds of the Southern Hemisphere : —

1. Whether the decline or destruction of the fishery is attributable to the slaughter of the seals while on shore at their breeding-places, or to their pursuit at large on the circumjacent ocean.

2. In what manner the fur-seal fishery has been and is conducted in each particular locality.

3. Whether any, and, if any, what measures have been taken by various Governments towards the protection of the fur-seal fisheries in their territories or in places within their jurisdiction; and, further, if any such measures are known to have proved successful in preserving or rehabilitating the fisheries.

4. Generally, any particulars as to the life-history of the animal, its migration, season of bringing forth its young, and the habits of the seals while engaged in suckling and rearing the young.

Now the answer is on page 456.

The main cause is due to the reckless and indiscriminate slaughter of the seals during their breeding season.

And so on.

H. H. Waldron. — The decline in the Southern Hemisphere, including the Falklands, is to be attributed to the indiscriminate slaughter of the females during the breeding season, whereby the young perish. Pursuit in the high seas is not carried on to any extent.

Then.

Question 2. In what manner the fur-seal fishery has been, or is, conducted in each particular locality.

J. J. Felton. — Formerly, by means of whale-boats; later on, by cutters and schooners. They would be fitted out for the “pupping” and the “shedding” seasons; as many men would be taken as possible, armed with clubs, spears, and guns, and, landing at the breeding places, they would line the beach and endeavour to turn the seals from taking to the water.

And so on, and that is repelated.

Whether any, and, if any, what measures have been taken by various Governments towards the protection of the fur-seal fisheries in their territories, or in places within their jurisdiction; and, further, if any such measures are known to have proved successful in preserving or rehabilitating the fisheries.

J. J. Felton. — In the Falklands, since the close season was enacted, there has been an increase of seals; but foreign schooners occasionally break the law.

J. J. Goodhart. — See answer to Question I.

E. Nilsson. — Does not see any improvement since the Law enacting a close season was passed.

H. Waldron. — To the same effect as J. J. Felton.

I think that is all, as far as I can make out.

Mr Justice Harlan. — The last answer on that page has a reference to the Falkland Islands.

Sir Charles Russell. — Thank you Sir, I will read it : —

H. Waldron. — Owing to keen pursuit, the seals prefer caves and ledges of rocks under high cliffs to form breeding rookeries. The fur-seal hauls up to breed in January, the young leaving in May for other rookeries with both “wigs” and “clap-matches”. There is no regular migration, but it is probable that, when hard pressed, they leave the South Shetlands and mainland for the Falklands. “They are peculiar in liking some places for several years, and then at once going away and not hauling up there again, apparently without cause, in some instances where but few were killed and in others quite unmolested.”

Lord Hannen. — That does not refer to the meaning it seemed to be quoted for.

Sir Charles Russell. — I have just pointed out to my learned friend I do not think it justifies the statement that the British Commissioners affirmed that fact.

Sir Richard Webster. — It was not intended to. It is independent. There is no evidence given in support of it. It is a statement of fact on behalf of the Government in the Counter Case, and that fact is noted in the British Commissioners’ Report and is set out at page 193 of the British Commissioners’ Report and referred to in section 129.

Lord Hannen. — However, your idea is that this Ordinance does not deal with the high seas at all.

Sir Richard Webster. — Yes, there has been in fact no assertion of it; there has been in fact, no exercise of the Act as if it did apply to the high seas : and those are facts which can be challenged and contradicted, if not accurate. Mr Budington does not vouch that he ever heard of any-

body, who ever heard of anybody else, who ever said that he had been prevented sealing : he only states that his understanding of the Ordinance is so and so.

General Foster. — A little more than that.

Sir Charles Russell. — No, I really read every word he said.

General Foster. — I beg your pardon. I followed closely.

Sir Charles Russell. — Well, I do not complain, but I really did.

Now, one at least of the Tribunal is aware of the very close scanning an Act requires, before it is intimated that Her Majesty will not disallow it. It is a duty which falls upon the permanent legal adviser of the Colonial Office, and in cases of importance or difficulty reference is also made to the Law Officers. It would be their duty to report against any Colonial Act which affected to assume a jurisdiction which it was beyond the competence of the Legislative Body, whatever it was, to exercise. If they so advised in respect of any act, the Privy Council, on that report, would advise the Queen to disallow it.

The President. — Well, I think we will adjourn now.

[The Tribunal thereupon adjourned until Tuesday next, the 30th of May, at 11.30 o'clock.]

TWENTY-NINTH DAY. MAY 30TH, 1893

The President. — Sir Charles, we are ready for you to resume your argument.

Sir Charles Russell. — Mr President, I go straight to the resumption of the examination of the instances of legislation by various countries adduced by the United States which they contend are analogous, involve an assumption of jurisdiction which they say justifies or strengthens their position. I have considered the legislation of the Falkland Islands; and I would ask the Tribunal to open the British printed Argument at page 41. At the bottom of that page, the legislation of New Zealand is considered; and this is, as we submit, a conspicuous instance of the misunderstanding of the United States of the character of this legislation. What is said about it in the Argument of the United States is at pages 167 and 168; but I only need refer to page 168 which sums up what they conceive to be the result. It is the second sentence on the top of that page of their Argument. Summing up the result, as they conceive it, they say :

In other words, authority was conferred by these Acts to seize vessels for illegally taking seals over an area of the open sea extending at the furthest point 700 miles from the coast; and the Government of New Zealand has since kept a cruiser actively employed in enforcing these regulations.

That is to say, regulations extending 700 miles from the coast. That will be found to be an entire misunderstanding of the subject.

Now, I will content myself with reading what is the actual fact as to that legislation. On page 41 of the British Argument we say :

The Statute No. 43 of 1878 for the protection of seals establishes a close season; no reference is made to waters, but the Governor may by order exclude any part of the Colony from the provisions of the Statute.

A "public fishery" is defined to be "any salt or fresh waters in the Colony, or on the coasts or bays thereof;" it includes artificial waters, and extends to the ground under such water.

Further, it is provided that offences against the Act committed on the sea-coast or at sea within one marine league of the coast are to be deemed as having been committed in a "public fishery."

There is a therefore, clear limitation to the one marine league from the coast.

"The Fisheries Conservation Act of 1884" applies to certain waters of the Colony, the term "waters" being defined to mean "any salt, fresh, or brackish waters in the Colony, or on the coasts or bays thereof." The Governor is enabled to make regulations for the protection of fish, oysters, or seals.

By "The Amendment Act No. 27 of 1887" the penalty for violating the principal Act in its application to seals is increased.

Vessels illegally taking seals are declared to be forfeited, and Her Majesty's vessels and officers are empowered to seize such vessels " *if found within the jurisdiction of the Government of the Colony of New Zealand.* "

The Act also allows vessels within the same jurisdiction to be searched.

The United States' Case contains an extraordinary mis-statement : —

Now, here is what is the United States say with regard to this legislation of New Zealand.

The area designated as ' the Colony ' is taken to mean the area specified in the Act [26 & 27 Vict., cap. 23, sec. 2] creating the Colony, which defines its boundaries as coincident with parallels 33° and 53° south latitude, and 162° east and 173° west longitude.

The definition in the Act [The Fisheries Conservation Act, 1884] of the term ' waters ' indicates that it applies to the entire area of the Colony, of which the southeastern corner is over 700 miles from the coast of New Zealand, although a few smaller islands intervene.

Then the Argument proceeds —

In the Map [which I will not stop to refer to, the Tribunal can refer to it for themselves] in the United States' Case an area coloured pink is shown, comprising the waters between the limits of latitude and longitude, to found the contention that these waters are included within the colonial limits.

The words of the Imperial Statute 26 & 27 Vict., cap 23, sec. 2, above referred to, nevertheless, are clear and explicit, and are not capable of being misunderstood.

The designation of the Colony in that Statute is as follows : —

The Colony of New Zealand shall, for the purposes of the said Act and for all other purposes whatever, be deemed to comprise *all territories, islands, and countries lying between 162° east longitude and 173° west longitude, and between the 33rd and 53rd parallels of south latitude.*

Only the territories, islands, and countries *lying between* these limits of latitude and longitude are thus seen to be included within the Colony!

In other words, in interpreting this Statute, the United States' representatives have fallen into what we conceive to be precisely the same mistake which they fell into in construing their own Treaty of Cession of 1867 between themselves and Russia : that misconception being that because that Treaty of 1867 described a certain line drawn from Behring Straits south-westwards beyond the Aleutian Chain, that thereby there was a cession as of territory of all the waters that lay to the east of that line.

All that is said here is that within those limits whatever is territory is part of the Colony, no more than that, just as the words used in the Treaty of 1867 were quite apt words to describe the cession to America of all that was territory lying within those degrees of latitude and of longitude. These facts were stated in the British Counter Case and yet the argument is repeated in the print by the United States as if the explanation had not been made.

Now the Cape of Good Hope comes next in order, on page 43, and I notice that the printed Argument of my learned friend does not refer to this case of the Cape of Good Hope. If I am to assume that that is given up by my learned friends, I will pass it without any notice, but unless my learned friend gives me that intimation I must of course notice it. It is mentioned by them in their Case. It is not referred to in their Argument, but we have in our Counter Case, at page 89, dealt with it and explained what

the facts were, and that has not been answered. I will read the explanation which is shortly put in page 89.

It proceeds thus :

It is stated in the United States Case that 'in the Colony of the Cape of Good Hope sealing is prohibited at the rookeries and in the waters adjacent thereto, except under stringent regulations'.

The evidence offered in support of these allegations consists of the following statements :

W. C. B. Stamp : who says : I am told, although I know nothing about it, that regulations of some kind have been made in the Colony of the Cape of Good Hope.

G. Comer : who says : The rookeries « are in the possession or control of a company, as I was then informed, which has the exclusive right to take seals there. We did not dare to go to those rookeries because sealing was prohibited, and we would not have been allowed to take them in the waters adjacent thereto. »

That does not further their view at all. Then it proceeds :

The Regulations in force in this Colony are of the character which appears from the Government Notice which is printed in the Appendix to the British Commissioners' Report. By this Notice all persons are prohibited "from disturbing the seals on the said island « [in Mossel Bay] and are warned from trespassing there.

The Government Agent states that there » is practically no pursuit of the animals in the water on these coasts. The system of killing the seals is the same throughout all the colonial islands, namely, with "clubs", by men landing in boats.

Then the explanation further proceeds.

As a matter of fact, the legislation at the Cape of Good Hope is entirely confined to the protection of seals on the islands.

There is no allegation of any assertion of any right inconsistent with that explanation which I have now read.

Now the case of Canada, again, is not referred to in the printed Argument of my learned friends, and I will pursue in relation to that the same course. Whether I am entitled to assume that the explanation given in our Counter Case was satisfactory or not, I do not know. I am entitled to say that the explanation was given of what the actual facts were in our Counter Case, and after that explanation is given, the matter is not again referred to or apparently relied upon in the United States Argument. It is referred to in the British Counter-Case, at page 89 :

Turning from the fur-seal to the other varieties of seals, it is alleged in the United States Case that, as regards the hair-seal in the North Atlantic —

"They have thrown about them upon the high seas the guardianship of British statutes... Canadian statutes prohibit all persons, without prescribing any marine limit, from disturbing or injuring all sedentary seal fisheries during the time of fishing for seals, or from hindering or frightening the shoals of seals as they enter the fishery."

The only Canadian Statute referred to is the Fisheries Act of 1886, which undoubtedly affects Canadian subjects upon the high seas, and all persons within the territorial waters of Canada, but asserts no jurisdiction over foreign subjects outside those waters.

Senator Morgan. — That is the statement from your Counter Case.

Sir Charles Russell. — Yes, which is not challenged in the printed

Argument subsequently delivered by the United States, and is the fact. I mean it states what the fact is. I am entitled to assume that in all these cases, unless the contrary is shown, that no case can be adduced of any assertion of a right outside the territorial waters. If my learned friends could have produced instances of such assertion outside territorial waters affecting other than British subjects, it would have been something to the point — it would have been at least the *argumentum ad hominem*; but it is not even that in the absence of any such evidence. They give an extract from the Canadian Statute which gives no justification whatever for the statement which is found in their Case; and the Tribunal will be good enough to bear in mind — I will refer to it later so as not to repeat myself — the paragraph which I have already explained as to colonial legislation, namely, that the power to legislate which is conceded to Colonies which have a representative system of Government — a constitutional Government, as it is shortly called — that that being a delegated power by the Imperial Parliament, it gives to the Colonial Legislature absolutely no power, even if it affected to exercise it, which it has not done, to legislate one inch beyond the actual territory. I shall point to some remarkable decisions of the Privy Council, which is the Appellate Court from the Colonies, which have given effect to that view of the powers of Colonial Legislatures.

Senator Morgan. — What was the penalty imposed in the Canadian Act upon the taking of hair-seals.

Sir Charles Russell. — I will tell you, Sir, in one moment. I have not got it in my mind at present.

Mr Justice Harlan. — It is at page 441.

Sir Charles Russell. — I think that for hunting or killing whales, seals or porpoises, and so on, it is a penalty not exceeding \$ 300, or imprisonment not exceeding six months. Everyone who with a boat or vessel knowingly disturbs, etc. a seal fishery is to be liable to a penalty not exceeding \$ 60, or in default one month, and is liable to pay such damages as are assessed by the Fishery Officer or Justice of the Peace. The Statutes are set out page 441 of the Appendix, vol. 1, of the Case of the United States.

Mr Justice Harlan. — The first section relates to rockets and explosive instruments, and the next to sedentary seal fisheries. I believe none of the provisions relate directly to seal hunting.

Sir Charles Russell. — No.

Senator Morgan. — Not to fur-seal hunting.

Lord Hannen. — It was included at any rate in the general description.

Sir Charles Russell. — I am informed by Mr Tupper that these Statutes apply to the shore fishery.

Senator Morgan. — They relate to hair-seals and not fur-seals.

Sir Charles Russell. — I should not say it related to hair-seals only, if there are such things as fur-seals in that neighbourhood, because the phrase is “seals” generally.

Lord Hannen. — It would include both classes of seals.

Senator Morgan. — There are no fur-seals in the Atlantic.

Lord Hannen. — I dare say.

Sir Charles Russell. — Very likely; that probably is so.

In reference to Mr Justice Harlan's reference to the use of any explosive weapons for the purpose of fishing, I am reminded *à propos* of an entirely different matter by Mr Tupper, which Mr Phelps will be able to correct if erroneous, — it is rather in reference to the illustration given by Mr Phelps as to whether it would be a defensible act to use dynamite at sea to kill fish, — Mr Tupper informs me that, by concert between the United States and Canada, each of these communities has passed regulations against the use of dynamite.

Mr Tupper. — No.

Sir Charles Russell. — No, that is not so. I am now told that they, foreseeing the possible danger that might ensue to interests which are interests not only of one country but of both, have concerted measures by their own legislation to deal with the use of anything of that kind.

Senator Morgan. — Can Mr Tupper cite the Tribunal to the arrangement or regulation between the United States and Canada on the subject of mackerel fishing?

Sir Charles Russell. — Well, this is not in reference to what I am talking about; but by all means, if you wish to ask Mr Tupper, do so, Sir. It is rather an interruption of my argument.

Mr Tupper. — The position of that matter is shortly this. The United States have legislated touching the taking of fish in their waters by purse-seining, and have prohibited the catching of mackerel in the United States' waters during the spawning period of the mackerel season. Canada has prohibited the use of purse-seines in Canadian waters for the whole year; that is from January till December; and, by an exchange of notes, the British Government, representing Canada, and the United States have now arranged to discuss a proposal for dealing with the mackerel fishery, if necessary, outside the 3-mile limit of the different countries.

Senator Morgan. — I wish to enquire if the basis of that Agreement was not the fact that this method of purse-seining was an injury to young mackerel.

Mr Tupper. — Yes, destroying them in great quantities.

General Foster. — I think as I participated with Mr Tupper in that negotiation I may add a little to the matter and refresh his memory in regard to it. I understood that a commission of experts has been appointed by the two Governments to settle the whole question of the fishing interests of the two countries in the adjacent waters no mention is made of mackerel fishery or purse-seining whatever according to my recollection. It covers the whole question of fishery — no mention is made of mackerel fishery in particular or purse-seining.

Mr Tupper. — Well we differ upon that and we can produce the correspondence if necessary.

Sir Charles Russell. — At all events Mr Tupper thinks not and whether it is, or is not, it is wholly immaterial. It is a very good illustration of what I referred to several days ago of where, for instance, trawling is found to interfere with sealing on the ground that it involves the loss of small fishes, nations have come by conventions (where the law cannot help one or the other) to mutual arrangements for the protection of their respective interests. It is a very good illustration, and all the better if Mr Foster is correct in saying it is not limited to mackerel fishing, but has a wider and more general application. The illustration becomes for that reason the stronger and not the weaker.

Lord Hannen. — I see from the passage cited from the Canadian Statute that they catch the seals there with nets.

Sir Charles Russell. — Yes apparently my Lord, and I believe the British Commissioners' Report further suggests that nets should be disused, and I think some time ago the question was asked by Lord Hannen why it was that nets were given up. I have since asked for the explanation, and the reason is that the nets frequently include very young seals as well as seals which are the object of capture, and very often result in the life of the younger seals being lost, and that is the reason why the Commissioners recommended its disuse.

I have said all that I need say about Canada. Now about Newfoundland. The observations on the part of the United States will be found at page 444, and it is also referred to at page 168 of the American Argument.

(1) That no seals shall be killed in the seal-fishing ground lying off the island at any period of the year, except between March 14 and April 20, inclusive, and that no seal so caught shall be brought within the limits of the Colony, under a penalty of \$4,000 in either instance.

(2) That no steamer shall leave any port of the Colony for the seal fisheries before six o'clock a.m. on March 12, under a penalty of \$5,000.

(3) That no steamer shall proceed to the seal fisheries a second time in any one year unless obliged to return to port by accident.

This act extends and enlarges the scope of a previous act, dated February 22, 1879, which contained similar provisions, but with smaller penalties, and also the provision which is still in force, that no seal shall be caught of less weight than 28 pounds.

That is the statement in the United States Argument, and it will be observed, to begin with, that there is no allegation there that that applies to foreigners at all.

Now our statement in reference to it is at page 44 of the British Argument.

The Seal Fishery Act, 1889, 42 Vict., cap. 1, established a close time for seals, and prohibits the killing of "cats" [immature seals] in order more efficiently to preserve this close time. Steamers are not allowed to leave port before a certain day.

The Seal Fishery Act, 1892, provides more stringent regulations for the observance of the close time, and heavier penalties for leaving port before a certain day.

Seals killed in breach of the close time are not to be brought into any port of the Colony or its dependencies under a penalty of 4,000 dollars.

Steamers are forbidden from going on a second trip in any one year, and if they shall engage at any time in killing seals at any place within the jurisdiction of the Supreme Court of Newfoundland after returning from the first trip they shall be deemed to have started on a second trip.

From these Statutes the following conclusions are drawn in the United States Case :

1. That Great Britain and its dependencies do not limit their Governmental protection to the fur-seal; it is extended to all varieties of seals wherever they resort to British territorial waters.

2. And they have thrown about them upon the high seas the guardianship of British Statutes.

It is admitted that the principle of providing a close time for seals has been adopted by British legislation as essential to the preservation of seal life.

It is denied that any country has the power to enforce such close-time regulations beyond the territorial waters against subjects of a foreign nation, though it may do so as regards its own subjects; and neither Great Britain nor her Colonies have ever departed or attempted to depart from this principle.

It is denied that the inferences drawn by the United States in respect of the legislation of some of the Colonies already considered are warranted. The principles of English law show conclusively that such inferences are unsound; it has already been shown that they are not in accordance with the facts; and no evidence has been adduced by the United States to support them.

Now I have one word further to say in relation to this statute. It has been objected by my friend, Mr Phelps, in his Argument, and pointed to also by Mr Coudert, that it was absurd to suppose that, where there was a valuable fishery carried on in the neighbourhood of the territory of a particular Power, that Power could put up with a state of things in which its own subjects there were to be prohibited during certain seasons from fishing, and yet that foreigners would not come under that regulation. That was the case that my friend Mr Coudert put very forcibly. The answer to it is this : That where the fishing is carried on in the neighbourhood of a territory, that peculiar and special advantages accrue, from that fact to the subjects or citizens of the territory : they have a base of operation which foreigners have not; and foreigners resorting to those fisheries (speaking as a general rule), must come within the territorial jurisdiction of that particular Power for some purpose or the other connected with their pursuit of fishing; and, once they come within the limits of that territory, they thereupon become subject to the laws of that territory; and in this case you will see (and in some other cases to which I shall call attention), that the colonial Legislature or other legislative power, imposes, and within its constitutional rights imposes, certain conditions on those ships that come into its ports : for instance, that they shall not be allowed to go out before a certain day, or they shall not be allowed to go out unless they comply with this, that or the other condition; and thus it is that by means of the operation of local law, against all who come within the area of local law, plus the natural advantages which proximity to the fishing grounds presents, speaking generally, the fishery is more valuable to the subjects or citizens of the territory who are connected with it, than it is to those who being foreigners are not connected with it. The statute upon which they rely is

set out at page 444 of the first volume of the Appendix to the Case of the United States. I am not going to trouble you, Sir, by referring to it. I am contenting myself with the statement — (it is there to be examined by the Tribunal if they desire) — that it does not warrant the inference drawn from it by my friends.

Now the next illustration is the Greenland or Jan Mayen fisheries, and they are referred to on page 168 of the Argument of my friend. The paragraph is short and I will read it. It says :

The seal fisheries of Greenland were the subject of concurrent legislation in 1875, 1876, and 1877 by England, Norway, Sweden, Denmark, and Netherlands, which prohibits all fishing for seals by the inhabitants of those countries before April 3 in any year, within an area of the open sea bounded by the following parallels of latitude and longitude, viz., 67° N., 75° N., 5° E., 17° W.

The mere reading of that sentence ought to dispense with further comment. It shows that this legislation of a concurrent kind arrived at by these several Powers, each of them recognizing that it has no power outside territorial limits to bind other than its own subjects, — the subjects of each of these Powers resorting to these fisheries are however bound by the legislation of their own country; and inasmuch as by convention these Powers have agreed to legislate so as to bind their respective subjects, then these laws have an extra-territorial application to the subjects of England, Norway, Sweden, Denmark and the Netherlands.

The matter is explained, and clearly explained, on page 45 of the printed Argument of Great Britain :

The second group of enactments of other countries referred to in the United States' Case are based upon Conventions; they therefore lend no support to the United States' contention, that they can by their independent action claim to enforce such regulations against the subjects of other nations in respect of fishing in the high sea.

The enactments in question are those of Great Britain, Sweden, Norway, Russia, Germany, and Holland. They all deal with the Jan Mayen seal fisheries in the Atlantic east of Greenland; and proceed on the principle here enunciated.

The principle is at once explained by the section of the Act which I am going to read.

The first section of " The Great Britain Greenland Seal Fishery Act of 1875 " is shortly as follows :

When it appears to Her Majesty in Council that the foreign States whose ships or subjects are engaged in the Jan Mayen fishery..... have made or will make with respect to their own ships and subjects the like provisions to those contained in this Act, it shall be lawful for Her Majesty, by Order in Council, to direct that this Act shall apply to the said seal fishery.

In other words, when the other nations have determined on their legislation, then the Queen, by Order in Council, can apply the provisions of the Act in question.

It then proceeds :

The legislation of the other countries is conceived in a similar spirit, and was passed after negotiations between their respective Governments.

The necessary legislation having been provided, the Queen, by Order in Council,

dated the 28th November, 1876, put the Act in force against her own subjects.

The great difficulty of effectively maintaining a close time in distant fisheries in the high seas, and of protecting and regulating such fisheries, except as against subjects, has in many instances been dealt with by Conventions, as is stated in the United States' Case.

These Conventions proceed on principles well established.

The principles are :

1. The determination of the limits of the exclusive fisheries of the respective parties to the Convention.

2. Except as expressly varied by agreement the respective national jurisdictions are preserved intact.

3. It is only by agreement that jurisdiction on the high sea over its nationals is given by one nation to another.

Because, you will observe that these conventions sometimes, not invariably, but frequently give the right to the cruisers of one nation to seize, upon the high sea, the ships of a subject of another Power, a party to the convention, which has offended against the provisions of the convention :

Then it goes on :

These principles do not advance the United States contention. The consent of other nations is wanting to the exercise by the United States of the exclusive control which it claims. The existence of the Conventions demonstrates their necessity; by such Conventions alone can one nation presume to control the subjects of another State upon the high seas.

They recognize the right of the subjects of all the contracting Parties alike to fish in the high sea beyond the territorial waters, but for their mutual benefit they subject the fishing to regulations to be observed by the subjects of all alike. The Conventions and the legislation giving effect to them do not profess to impose these regulations on the subjects of other countries, not parties to the Conventions, nor to prohibit them in any way from fishing in the high seas, nor could they do so.

The next case is Russia, which is referred to on page 169 of the Argument of the United States; and a statement that is made here, necessitates that I should go a little out of my way in this matter.

The statement in the Argument of the United States is this :

By the law of Russia, the whole business of the pursuit of seals in the White Sea and Caspian Sea, both as to time and manner, is regulated, and all killing of the seals except in pursuance of such regulations is prohibited.

Certain references are then made : and it proceeds :

The firm and resolute recent action of the Russian Government in prohibiting in the open sea, near the Commander Islands, the same depredations upon the seal herd that are complained of by the United States in the present case, and in capturing the Canadian vessels engaged in it, is well known and will be universally approved. That Great Britain, strong and fearless to defend her rights in every quarter of the globe, will send a fleet into those waters to mount guard over the extermination of the Russian seals by the slaughter of pregnant and nursing females, is not to be reasonably expected. The world will see no war between Great Britain and Russia on that score.

Well, it seems to me (although we know from the correspondence that we have, that the representatives of the United States have been in communication with Russia) — that this is a mis-statement, as I hope to make clear, of Russian action and Russian pretensions on this matter.

First of all I wish to deal with the matter of Russian legislation and of Russian action ; and we have got a very reliable means of judging of that by a correspondence entirely on the part of those interested from the point of view of the United States, and I am afraid, Sir, I must ask you to refer to one more book in this connection. It is Volume II of the Appendix to the British Case. The correspondence begins at the bottom of page 16 of Part II. You will see there, Sir, a letter from Mr Hoffman. Mr Hoffman was, as I understand, the Representative at St. Petersburg, of the United States.

General Foster. — He was the *Chargé d’Affaires*.

Sir Charles Russell. — The *Chargé d’Affaires*.

Now, this letter is sent to him from the Department of State, on the 7th of March, 1882.

SIR : I enclose copies of letters from the Treasury, and a copy of a letter from Messrs Lynde and Hough, of San Francisco, to the Secretary of the Treasury, touching the Pacific coast fisheries. This latter communication states that, according to late news, “ foreign vessels must receive an order from the Governor of Siberia, besides paying duties of 10 dollars per ton on all fish caught in Russian waters ”, which they say would be ruinous to their business. In view of the above, I have to ask that you will make immediate enquiry on this subject, and report the facts. If a brief telegram will furnish information of value to our fishermen in this regard, you can send one.

Then the enclosures are to be found on page 17. I will read the second and third of those enclosures ; the first I need not trouble you with, I think. The second is :

The subjoined Notice by the Russian Consul at Yokohama, that American vessels are not allowed, without a special permit or licence from the Governor-General of Eastern Siberia, ‘ to carry on hunting, trading, fishing, etc., on the Russian coasts, or islands in the Okhotsk or Behring Seas, or on the north-eastern coast of Asia, or within the sea-boundary line ’, is published by the Department for the information of American ship-masters interested.

Now, here is the third enclosure.

At the request of the local authorities of Behring and other Islands, the Undersigned hereby notifies that the Russian Imperial Government publishes, for general knowledge, the following.

(1) Without a special permit or licence from the Governor-General of Eastern Siberia, foreign vessels are not allowed to carry on trading, hunting, fishing, etc., on the Russian coast or islands in the Okhotsk and Behring Seas, or on the north-eastern coast of Asia, or within their sea-boundary line.

Mr Justice Harlan. — What line is that? What does he mean there by the sea-boundary line?

Sir Charles Russell. — The marine league from the shore. You will see that presently, Sir, when I have developed the correspondence.

Then it proceeds :

(2) For such permits or licences, foreign vessels should apply to Vladivostock, exclusively.

(3) In the port of Petropaulovsk, though being the only port of entry in Kamtchatka, such permits or licenses shall not be issued.

(4) No permits or licences whatever shall be issued for hunting, fishing, or trading at or on the Commodore and Robben Islands.

Those are, you will recollect, specially seal islands. Then it goes on :

(5) Foreign vessels found trading, fishing, hunting, etc., in Russian waters, without a licence or permit from the Governor-General, and also those possessing a licence or permit who may infringe the existing bye-laws on hunting, shall be confiscated, both vessels and cargoes, for the benefit of the Government. This enactment shall be enforced henceforth, commencing with A. D. 1882.

(6) The enforcement of the above will be intrusted to Russian men-of-war, and also to Russian merchant-vessels, which, for that purpose, will carry military detachments and be provided with proper instructions.

Then at page 18 follows a letter — the fifth enclosure — from which I must read an extract before I read Mr Hoffman's reply, in which Messrs Lynde and Hough state their position and their complaint :

Sir : You will please pardon us for this seeming intrusion, but the matter in which we now seek your aid and assistance is of great import to us.

We now are and have been extensively engaged in the Pacific Coast Cod fisheries, and, in fact, are among the very few who fifteen years ago started in a small way, believing with energy and fair dealing we could work up an enterprise that would be a benefit to the coast. Our ideas were correct. We have been yearly sending vessels to the coast of Kamschatka (Sea of Okhotsk) for fish. We never have been molested in Russian waters from catching cod-fish or procuring bait, which are small salmon in the rivers, or filling fresh water for the use of ship, but it appears now there is a law which has never been enforced against foreigners, the same we have recently noted, and which we have been apprised of, and the substance is that foreign vessels must receive an order from the Governor of Siberia, besides must pay a duty of 10 dollars per ton or all fish caught in Russian waters. This decree, if sustained —

And so on.

Now this communication being made to Mr Hoffman at St Petersburg, here is his answer. He says :

I have the honor to acknowledge the receipt of a Circular of the Treasury Department of the 30th January last upon the subject of fishing, etc, in the Behring Sea and in the Sea of Okhotsk.

I am able to give the Department some little information upon this subject, derived nearly four years ago from Mr Charles H. Smith, for many years a resident of Vladivostok and at one time our Consul or Vice-Consul at that port.

A glance at the Map will show that the Kurile Islands are dotted across the entrance to the sea of Okhotsk the entire distance from Japan on the south to the southernmost cape of Kamtschatka on the north.

In the time when Russia owned the whole of these islands her Representatives in Siberia claimed that the Sea of Okhotsk was a *mare clausum*, for that Russian jurisdiction extended from island to island, and over 2 marine leagues of intermediate sea from Japan to Kamschatka.

But about five years ago Russia ceded the southern group of these islands to Japan in return for the half of the Island of Saghalien, which belonged to that power.

As soon as this was done it became impossible for the Siberian authorities to maintain their claim. My informant was not aware that this claim had ever been seriously made at St. Petersburg.

The best whaling grounds are found in the bays and inlets of the Sea of Okhotsk. Into these the Russian Government does not permit foreign whalers to enter,

upon the ground that the entrance to them, from headland to headland, is less than 2 marine leagues wide. But while they permit no foreign whalers to penetrate into these bays, they avail themselves of their wealth very little. The whole privilege of whaling in those waters is a monopoly owned by an unimportant Company, which employs two or three sailing schooners only, the trying and other laborious work being done at their stations on shore.

Then apparently he inquires farther into the matter, and he says, in a letter dated March 27th 1882, page 49.

I have the honor to acknowledge the receipt of your No 120, with its inclosures, in reference to our Pacific Ocean fisheries. Your despatch reached me yesterday, and to-day I have written to M. de Giers upon the subject, and I propose to call upon him upon his first reception day.

In the meantime, and until further information, I do not see that any new orders necessarily affecting our fishermen have been issued by the Russian Government. Messrs Lynde and Hough have apparently given insufficient attention to the words « Russian waters ». These waters are defined in the Notice published by the Imperial vice-consulate at Yokokama, as follows : —

“ Fishing etc., on the Russian coast or islands in the Okhotsk and Behring Seas, or on the north-eastern coast of Asia, or within their sea-boundary line. ”

If I recollect correctly the information given me by Mr Smith upon this subject, referred to in my No 44 of June 1878, and in my number 207 of this month, the cod banks lie in the open Sea of Okhotsk, many marine leagues off the south-western coast of Kamschatka. I observe that Messrs Lynde and Hough state that their vessels fish from 10 to 25 miles from the shore. At that distance in an open sea they cannot be said “ to fish upon the coast. ”

I do not think that Russia claims that the sea of Okhotsk is a *mare clausum*, over which she has exclusive jurisdiction. If she does her claim is not a tenable one since the cession of part of the group of the Kurile Islands to Japan, if it ever were tenable at any time.

I may add that, according to the information given me four years ago, Russia opposes no objection to foreign fishermen landing in desert places on the coast of Kamchatka, far from the few villages which are found on that coast, for the purposes of catching bait and procuring fresh water; but she does object to all communication between trading and fishing vessels and the inhabitants, alleging that these vessels sell them whiskey upon which they get drunk, and neglect their fishing, their only means of livelihood, and then, with their wives and children, die of starvation the ensuing winter.

Then there comes a further note from the same gentleman in these terms. In the first paragraph he says :

I have the honor to forward to you herewith a translation of a note recently received from M. de Giers upon the subject of hunting, fishing, and trading in the Pacific waters.

I do not see that there is anything in the Regulations referred to that affects our whalers, nor our cod fisheries either, except that when they go ashore to catch small fish for bait in the streams, they expose themselves to interruption from the Russian authorities, who, finding them in territorial waters, may accuse them of having taken their fish therein.

Then M. de Giers' letter follows. It is in these words :

Referring to the exchange of communications which has taken place between us on the subject of a Notice published by our Consul at Yokohama relative to fishing,

hunting, and to trade, in the Russian waters of the Pacific, and in reply to the note which you addressed to me, dated the 15th (27th) March, I am now in a position to give you the following information.

A Notice of the tenour of that annexed to your note of the 15th March was, in fact, published by our Consul at Yokohama, and our Consul-General at San Francisco is also authorized to publish it.

This measure refers only to prohibited industries and to the trade in contraband; the restrictions which it establishes extend strictly to the territorial waters of Russia only. It was required by the numerous abuses proved in late years, and which fell with all their weight on the population of our sea shore and of our islands, whose only means of support is by fishing and hunting. These abuses inflicted also a marked injury on the interests of the Company to which the Imperial Government had conceded the monopoly of fishing and hunting ("exportation") in islands called the "Commodore" and the "Seals".

Beyond the new Regulation, of which the essential point is the obligation imposed upon captains of vessels who desire to fish and to hunt in the Russian waters of the Pacific to provide themselves at Vladivostock with the permission or licence of the Governor-General of Oriental Siberia, the right of fishing, hunting, and of trade by foreigners in our territorial waters is regulated by Article 560 and those following of Vol. XII, Part II, of the Code of Laws.

Now, Sir, if you look to the bottom of that page headed "Inclosure 2", you will see the Articles.

ARTICLE 560. The maritime waters, even when they wash the shores where there is a permanent population, cannot be the subject of private possession; they are open to the use of one and all.

ART. 561. No exception will be made to this general rule, except under the form of special privileges granted for the right of fishing in certain fixed localities and during limited periods.

ART. 562. The above Regulation regarding the right of fishing and analogous occupations on the seas extends equally to all lakes which do not belong to private properties.

ART. 565. No restriction shall be established as regards the apparatus (engines) employed for fishing and for analogous operations in the high seas, and it shall be permitted to every one to use for this purpose such apparatus as he shall judge to be best according to the circumstances of the locality.

ART. 571. Ships in quarantine are not permitted to fish. The same prohibition extends in general to all persons in those localities where ships are lying undergoing quarantine.

Now you see, Sir, that this correspondence is between two Government Departments of the United States. My friends had access to this even more readily than we had access to it. There it is; and you will now see how far they are founded in the observations they make in their case on this subject.

Now I conclude the matter by asking your attention to page 22 of the same volume. The correspondence I have been reading, up to the present time, you will observe, Sir, relates to the year 1882.

Now on page 22 is a later letter in 1887, from Mr Lothrop who was I think — general Foster will correct me if I am wrong — then the *Chargé d'Affaires*?

General Foster. — He was then Minister.

Sir Charles Russell. — He was then Minister of the United States at

St.-Petersburg. He says, writing to Mr Bayard who was, as you will recollect, Sir, Secretary of State at that time :

I have the honour to transmit to you a translation of a communication received from the Imperial Foreign Office on the 1st February instant, relative to the seizure of the schooner " Eliza ".

The Russian Government claims that she was seized and condemned under the provisions of an Order, or Regulation, which took effect at the beginning of 1882, and which absolutely prohibited every kind of trading, hunting, and fishing on the Russian Pacific coast without a special licence from the Governor General.

It is not claimed that the " Eliza " was engaged in seal-fishing, but that she was found actually engaged in trading with the natives with the contraband articles of arms and strong liquors.

She was condemned by a Commission sitting on the Imperial corvette " Rasboïnik ", composed of the officers there of. In this respect, the case, is precisely like that of the " Henrietta ", mentioned in my last preceding despatch N° 95, and of this date.

It will be noticed that Mr Spooner, the owner of the " Eliza ", in his statement of his claim, declares that the " Eliza " was on a trading voyage, engaged in bartering with the natives, and catching walrus, and as such did not come under the Notice of the Russian Government, which was directed against the capture of seals on Copper, Robbins, and Behring Islands.

It will be seen that Mr Spooner either refers to an Order of the Russian Government different from the one mentioned by the Imperial Foreign Office, or he understood the letter in a very different sense.

I may add that the Russian Code of Prize Law of 1869, Article 21, and now in force, limits the jurisdictional waters of Russia to 3 miles from the shore.

I think that is all.

The communication from General Vlangaly to Mr Lothrop appears to corroborate the statement of Mr Lothrop, that it was not a question of fishing, but a question of the " Eliza " being engaged in an illicit trade.

The second part of that letter is to this effect : —

This information is in substance to the effect that the " Eliza " was confiscated not for the fact of seal hunting, but by virtue of an Administrative Regulation prohibiting, from the beginning of the year 1882, every kind of commercial act, of hunting, and of fishing on our coasts of the Pacific, without a special authorization from the Governor-General, and carrying with it, against those disregarding it, the penalty of the seizure of the ship as well as of the cargo.

Then a little lower down he says :—

The crew of the " Eliza " was engaged not only hunting walrus on our coast of Kamschatka, and in commercial transactions with the natives, but traded there with illicit articles such as arms and strong liquors.

I think it will also be found that at a later stage, although emulating to some extent, but a little way behind the United States, some seizures have been made by Russia; it will be found that they allege that those seizures were made within territorial waters and that they required the captains seized to sign statements that in point of fact they were illegally engaged within the limits of the territorial waters; but this is a matter with respect to which I do not wish at present to be diverted. I think you will see, Sir, that I have answered satisfactorily the point which is made here.

Marquis Venosta. — Do you not think that the Russian Government has perhaps considered the Gulf of Mesensk as a gulf, the waters of which are territorial waters? I do not know, I ask you.

Sir Charles Russell. — That I am just coming to Sir.

Marquis Venosta. — Because a nation may recognize the general rule of the cannon-shot on the open sea, and may have some peculiar claim, more or less plausible, in regard to a gulf.

Sir Charles Russell. — I am just coming to that : it is the next item of that argument. At the bottom of page 46 it says :

The Russian law dealing with the Ustinsk sealing industry in the white Sea is set out in the United States case.

The industry is carried on in the Gulf of Mesensk in the White Sea; the gulf is 53 miles wide.

The principal provisions of the law are the appointing certain days of departure to the fisheries, and prohibiting the lighting of fires to windward of the groups or hauling-grounds of the seals.

The law is not directly or indirectly applied to foreigners.

In this law again, you see an example of the control that possession of territory gives over foreigners if they come within the sphere of its operation, as they may be obliged to do; they are controlled by the local law regulating days of departure, or other conditions of departure; and it may further be, as Count Venosta has been good enough to suggest, that Russia may think that it has a claim to the Gulf of Mesensk upon another and different ground as being a gulf largely enclosed by territory. But it does not seem to me necessary to consider that : and both Governments recognize, that what Marquis Venosta has been good enough to suggest is possible.

I have already dealt with Behring Sea, and the Sea of Okhotsk, on page 47.

Then as regards the Caspian Sea, at the bottom of page 47 of the British Argument, it is said :

The fishing and sealing industries in the Caspian Sea are also dealt with by law, which expressly declares that the catching of fish and killing of seals in the waters of the Caspian included in the Russian Empire are free to all who desire to engage in the same, except in certain specified localities, under observance of the established rules. A close time is appointed.

Of course the Caspian Sea stands in an entirely different category from any we have been discussing. The Caspian is a land-locked sea included within the territorial dominions of Russia and Persia, and I need not say that that being the fact, those Powers have absolutely the right to exclude all whom they please from access to those territories, because the access can only be obtained, in the one case through Russian, and in the other case through Persian territory : because it is an admitted right of sovereignty to deny access through their territory to any person they please.

Senator Morgan. — Do you know, Sir Charles, whether Persia has coincided with Russia in its enactments?

Sir Charles Russell. — I am unable to say, Sir; and it is enough to say that one need only look at the map to see that the Caspian Sea is entirely surrounded by land — Persian on the one side and Russian on the other — but the case affords no aid to this Tribunal at all on the question we are discussing, and presents no analogy.

Now the next case is that of Uruguay; and as to this, I have to say that although this is referred to in the Case of the United States, it is answered in the British Counter Case at page 90, and after that answer has been given, it is not thereafter adverted to in the printed Argument of the United States; and therefore I content myself with saying that the answer has been given in the British Counter-Case, and to this there has been no rejoinder.

The statement is this. It is, in effect, the statement at page 48 of the British Argument :

The laws of Uruguay which regulate the taking of seals upon the Lobos Islands do not extend beyond the ordinary territorial jurisdiction, and have no application to pelagic sealing beyond that limit. Seals are taken on the islands, and the State —

this is part of the enactment

does not permit vessels of any kind to anchor off any of the said islands, and does not allow any works to be constructed that might frighten the seals away.

That is the whole story.

So as to Chile; that is referred to in the Case of the United States, but is not reproduced in the Argument of my learned friend.

Mr Phelps. — At the bottom of page 168, in the Argument, you will find a reference to Uruguay.

Sir Charles Russell. — I beg your pardon; that is so. I had omitted to notice it.

Under the law of Uruguay the killing of seals on the Lobos and other islands "in that part of the ocean adjacent to the departments of Maldonado and Rocha" is secured to contractors, who pay to the Government a license fee and duty.

If that is all that my learned friend has to say about it, I am content to take it, it is not a thing that demands an answer.

Then Chile is mentioned in the Case; I will read what we say about it at page 90 of our Counter Case. We set out what is said in the United States' Case thus :

The United States' Case says :

The Governments of Chile and the Argentine Republic have also recently given protection to the fur-seals resorting to their coasts in the hope of restoring their almost exterminated rookeries.

The mischief, however, appears to have been entirely done by sealers landing on the rookeries. Mr Comer states that.

If there had been strict regulations enforced, allowing us to kill only young "wigs", and not to disturb the breeding seals, I am convinced, and have no doubt, that all these rookeries would be full of seals to-day.

The Chilean law referred to appears to be the Ordinance of the 17th August, 1892, from which the following extracts are made in order to show that the Chi-

lean Government asserts no jurisdiction beyond the ordinary 3-mile limit, but is careful to define strictly the limits of the operation of the Ordinance : —

Then the Ordinance is set out.

“ Ordinance regulating the Pursuit at Sea or on Land of Seals or Sea-wolves, Otters and ‘Chungungos’ in the Coasts, Islands, and Territorial Waters of Chile.

“ ARTICLE 1. Only Chileans and foreigners domiciled in Chile are allowed to engage in the pursuit on land or at sea of seals or sea-wolves, otters, and ‘chun-gungos’ in the coasts, islands, and territorial waters of the Republic, as laid down in Article 611 of the Civil Code.

“ No ships can engage in the pursuit to which this Ordinance refers except those Chilean vessels which are in possession of the qualifications required by the Navigation Laws to be considered as such, foreign vessels being absolutely prohibited from engaging in this industry.

“ ART. 2. For the purposes of this Ordinance, *the coasts, islands, and territorial waters* of Chile shall be considered as divided into as many zones as there are Maritime Governments in the Republic.

“ The extent of each zone shall be that of the respective Maritime Government. ”

Then it proceeds :

Acting under powers conferred by the above Ordinance, the President of the Republic on the 20th August, 1892, decreed that the fishery of seals

“ be suspended for the period of one year in the regions included in the Maritime Governments of Chiloe and Magellanes, and on the coasts of the Islands of Juan Fernandez. ”

The general law of Chile as to fisheries is contained in the Civil Code, where it is enacted :

ARTICLE 585.

And I would beg to compliment Chile upon its very accurate statement of what I conceive to be the law recognized by nations in this matter.

Things which in their nature are common property, as the product of the high seas, are not subject to any dominion, and no nation, corporation, or individual has any right to monopolize them. The use or enjoyment of them is determined among the citizens of any one nation by the laws of that nation, but between different nations by international law.

“ ARTICLE 593. The adjacent sea, to a distance of 1 marine league, measured from low-water mark, is the territorial sea, and under the national dominion; but police administration for the purposes of the security of the State or the carrying out of fiscal Regulations, extends to a distance of 4 marine leagues, measured in the same manner. ”

The 4 marine leagues for the two purposes mentioned I do not admit; nor for the latter purpose, without the qualification which I have more than once given.

“ ARTICLE 611. Sea fishing is free, but in the territorial seas the right of fishing is enjoyed only by Chilean citizens or domiciled foreigners. ”

Now the next case given is the Argentine Republic and that was mentioned in the Case, but is not again mentioned I think I only need read what is said in the British Argument, p. 48.

“ The laws of the Republic are not set out in the United States’ Appendix. The statement in the United States’ Case is merely that protection is given to the fur-seals resorting to the coasts; it is not stated that the regulations are extra-territorial, or that they apply to foreigners. ”

The next case is Japan. This also appeared in the United States Case, but it does not appear in the Argument. It is dealt with at page 92 of the British Counter Case.

It is also stated that "the Japanese Government has taken steps toward the restoration and preservation of the fur-seals at the Kurile Islands". The extract from Regulations of 1885 referred to by way of verification, and set forth in the Appendix, relates to islands within the territory of Japan, and no other law is set forth or mentioned; nor is it alleged in the Case that any of the Japanese laws relating to seal fisheries have an extraterritorial operation. Further, the Regulations of 1885 do not appear to be now in force, for the full official Memorandum supplied on the 14th December, 1891, by the courtesy of the Japanese Government, in answer to a circular asking for "copies of any printed documents or Reports referring to the fur-seal fisheries" sets forth "the several Regulations in force at the present time", among which those of 1885 are not given; and it states that there are no means of checking "foreign poachers" "outside the line of territorial limit fixed by international law."

Now, so far, I think I have dealt with every case cited on this point: and on page 49 of our Argument is stated the conclusion to which I think the Tribunal is justified in coming upon an examination in detail of these instances.

None of the countries above specified profess to control the killing of seals by extra-territorial provisions, or by interfering with foreigners on the high seas, or in any other way than in accordance with the principles already established; nor do they profess to claim a property in or a right of protection of seals in the high sea.

The first contention of the United States, that seal life is protected by extra-territorial laws of other countries applicable to foreigners, is therefore shown to be without foundation.

I now come to the next branch of this argument.

A further contention of the United States is that, not seal-fisheries only, but other fisheries, are protected by extra-territorial laws of other nations, and that they are extended to foreigners.

Then there are the Irish oyster fisheries, the Scotch herring fisheries, the Ceylon pearl fisheries, the Queensland and West Australian fisheries, which may be called British examples: and the foreign examples are France, Algeria, Italy, Norwegian, Columbia, and Mexico. These I will examine in order.

The subject of the Irish oyster fisheries which comes first in order is referred to on page 166 of the United States Argument. It says:

Oyster beds in the open sea have been made the subject of similar legislation in Great Britain.

A section of the British "Sea Fisheries Act, 1868", conferred upon the Crown the right by orders in council to restrict and regulate dredging for oysters on any oyster bed within *twenty* miles of a straight line drawn between two specified points on the coast of Ireland, "outside of the exclusive fishery limits of the British Isles." The act extends to all boats specified in the order, whether British or foreign,

Now so far (and I should like the Tribunal to follow this a little closely) it states, and states correctly, that this British "Sea Fisheries Act 1868", which *prima facie* applies only to subjects of the Crown, and not to foreigners, gives to the Crown the right, by Order in Council, to specify

boats, whether British or foreign, and so bring them within the operation of the Act. Now I call attention to what the actual state of the case is, and to the further fact that no such Order has been ever made to include any foreign boats, and that there has never been any assertion of power under this Act as against any foreigner whatever.

I might, but for the way in which it has been referred to, dismiss it very lightly, because at page 93 in our Counter Case, relating to this matter, we make this statement :

As to Ireland, the British Government have never assumed to put in force against foreigners any bye-laws made under "The Seal Fisheries Act, 1868," affecting waters outside territorial limits. And although this Act is relied on in the United States' Case as authorizing the assertion of jurisdiction over foreigners outside those limits, no bye-law having that effect exists, and it would be contrary to the practice of the British Government that any such bye-laws should be made, unless in pursuance of some Treaty with the Power whose subjects may be affected.

Now that is a statement of fact my learned friend, when he came to prepare his Argument did not meet, and could not meet, and it ought to be quite enough for the purpose of this discussion.

But the matter is gone into fully in the British Argument at page 50.

The Statute permits the Irish Fishery Commissioners to regulate, by bye-laws, oyster dredging on banks 20 miles to seaward of a certain line drawn between two headlands on the east coast of Ireland.

Within this line the extreme depth of indentation is not more than 5 miles.

The Act provides that the bye-laws are to apply equally to all boats and persons on whom they may be binding ; but they are not to come into operation until an Order in Council so directs.

The Order in Council is to be binding on all British sea-fishing boats, and on any other sea-fishing boats specified in the Orders.

Therefore, till there is an Order specifying any except British sea fishing boats, it has, and can have, no application to any other.

The facts which have occurred since the passing of the Statute are as follows :

The Commissioners have made a bye-law appointing a close time.

The bye-law was put in force by Order in Council of the 29th April, 1869.

The Order recited the power given to the Queen by the Act to specify other besides British boats to which the bye-law was to apply.

No other boats were so specified.

The law is therefore expressly limited to British boats within the 20 miles. It cannot by the terms of the Act itself apply to any foreign boats.

It would be contrary to the principles on which British legislation invariably proceeds that bye-laws should apply to foreign boats outside the 3-mile limit, unless power to enforce such a bye-law against the boats of any nation had been acquired by Treaty.

The provision was inserted in the Act to provide for the case of any such Treaty being entered into.

Thereafter, without such enabling provision in the Act, the Queen would possess no power to make an order in Council bringing foreigners within the Act.

The statement made in the United States' Case is therefore inaccurate.

You see therefore the object of the assertion of that power : because, if a Treaty should be made with any other State that might be interested in this fishery, the Queen would have had no jurisdiction to apply it to

persons outside the three-mile limit other than her own subjects, unless the Statute gave her express power so to do.

Now the next case referred to is the Scotch Herring Fishery; and precisely the same thing may be said of this :

By the Act of 1887, 52 and 53 Vict, cap. 23, a close time is provided, and trawling is prohibited within the north eastern indentation of the coast of Scotland; the line of limit is drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, a distance of 80 miles.

Penalties are imposed on any person infringing the provisions of the Act.

Stress is laid in the United States' Case on the words " any person ; " and the statement is made that " the Act is not confined in its operations to British subjects. "

This statement is at variance with the principles of English legislation and the practice of the English Courts in interpreting Statutes.

" Any person " is a term commonly used in English Statutes dealing with offences, and it is invariably applied to such persons only as owe a duty of obedience to the British Parliament.

That is to say, so far as their extra-territorial application is concerned. But I cannot help thinking that with regard to all this class of cases, it helps the Tribunal very, very little, if at all; because, supposing it were to be made clear that there was a case in which a Legislature had affected to bind foreigners outside territorial limits, that is either a good law or a bad law. It does not make it international law because a particular Power has affected to usurp a power which international law does not warrant it in assuming. I shall later have to call attention to cases illustrating this principle of the construction of British Statutes which I have been referring to, namely, that if the words of a Statute are general in its application to all persons, the uniform rule of construction is that, extra-territorially, it applies only to those who are subject to the laws of Great Britain.

Now, the next case cited is the Ceylon Pearl Fishery, and I may say in passing that this is a subject which may be referred to under a different head of claim. The erudition of the members of the Tribunal may be possibly able to supplement my scant information on the subject, but, as far as I know, these fisheries of Ceylon and Bahrem stand in a position perfectly unique. How old they are, I do not know. Some of my learned friends have said that they are old enough to be mentioned in Herodotus. I do not know how the fact is, I have not been able to verify it; but these facts are undoubted that for many generations the owners of the territory of Ceylon have, with the acquiescence of all other Powers of the World, been allowed to claim to exercise dominion in respect of these Fisheries which are contiguous to the coast but which extend beyond the three miles of the territorial zone or belt. Those facts are undoubted, and I care not whether the title is without a flaw; it is a title which has been recognised for a great many years; has been acquiesced in; and as to which, as far as I know, no dispute has ever occurred. There is also the consideration whether this case may not be referable to a different consideration; it may, possibly be founded upon exclusive possession, from their contiguity to the shore and from the manner in

which the fisheries are themselves carried on. My learned friend Mr Carter was very powerful in relation to the suggestion that the claim to the Ceylon Fisheries was defended upon the ground that you could occupy portions of the sea away from the land; and he then proceeded to say that, if that was so, then all that a Nation had to do was to discover where there was a valuable feeding bank for some valuable race of fish, and buoy it out where you could get a bottom sufficient at all events, to plant your leads upon the ground, — to buoy out 100 square miles, or 200 square miles, leave the buoys, and say “ That is our territory. ”

I must ask the Tribunal, is that an argument which is to be treated seriously? Is there any analogy between that case and the occupation of a very small portion of the bottom of the sea contiguous to admitted territory, and the pursuit there of this particular fishing? I submit that the analogy does not exist, and the illustration is one that is very strained. There is undoubtedly some warrant for the distinction between the case of these fisheries, whether they are pearl, or whether they are coral, or whether they are oyster, and there is an obvious distinction in fact, between a fishery of that description and one which depends on the pursuit of any free-swimming fish in the Ocean. Chief Justice Cockburn, in that case of the *Queen v. Keyn*, which has been so often referred to, says that a portion of the bed of the sea, where it can be physically, permanently occupied, may be subject to occupation in the same manner as unoccupied territory; Vattel also is cited upon page 52 of our Argument, he says :

Who can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become property?

Mr Justice Harlan. — Where is Chief Justice Cockburn’s judgment reported?

Sir Charles Russell. — It is in the Law Reports, 2 Exchequer Division, at page 63. I can lend any of the Tribunal the book if they desire it.

Mr Justice Harlan. — Yes, I should like to see it.

Sir Charles Russell. — I may have to refer to it a little later.

I must refer now to the Australian Pearl Fisheries as another instance of a clear misunderstanding on the part of my learned friends. On page 52 of our Argument we state that —

In the United States Case reference is thus made to the Australian fishery laws : —

“ These Statutes extended the local regulations of the two countries mentioned (Queensland and Western Australia) to defined areas of the open sea of which the most remote points are about 250 miles from the coast of Queensland and about 600 miles from the coast of Western Australia ”.

It suffices to point out that these statutes are in express terms confined to British ships and boats attached to British ship.

The reference is to page 233 of the United States Case. This is the passage :

The pearl fisheries of Queensland and Western Australia were, in the years 1888 and 1889, made the subject of regulation by two statutes enacted by the Federal

Council of Australasia. These statutes extended the local regulations of the two countries mentioned to defined areas of the open sea, of which the most remote points are about two hundred and fifty miles from the coast of Queensland, and about six hundred miles from the coast of western Australia.

General Foster. — We go on to say that they are confined to British subjects.

Sir Charles Russell. — Yes that is just what I am going to read :

These acts are, by their terms limited in their operations to British subjects,

(And therefore of course have nothing to do with the case,)

but as Sir George Baden-Powell has pointed out, in a recent address delivered before the Association for the Codification of the Law of Nations, the remoteness of these waters renders it practically impossible for foreign vessels to participate in the pearl fisheries without entering an Australian port, and thereby rendering themselves amenable to Australian law.

Quite so, that is what I have been saying, and why that should have been cited I do not know.

Then the next case is the law of France as to which the Tribunal have the best means within their reach of informing themselves if we do not explain it correctly. France is referred to at page 165 of the United States Argument thus :

Legislation of the same character has also taken place in France and Italy in reference to coral reefs in the open sea and outside the jurisdictional limits.

The French law of 1864 relating to the coral fisheries of Algeria and Tunis required all fishermen to take out licenses to fish anywhere on the coral banks, which extend into the Mediterranean 7 miles from shore. In addition to this license all foreign fishermen were required to take out patents from the Government, for which a considerable sum had to be paid; and by the recent act of 1888, foreign fishermen are precluded entirely from fishing within 3 miles from shore, apparently leaving the former regulations in force with respect to such portions of the coral banks as lie outside of those limits.

Now we have dealt with the whole of the French legislation which they mentioned in their original case, but when my learned friend comes to his Argument the only point which is made relates to the case of Algeria and Tunis, and I think I must trouble the Tribunal with a short reference to what we say about this subject at page 94 of the British Counter Case.

The United States Case says that the Decree of the 10th May 1862. —

“ went so far as to provide in terms that under certain circumstances fishing might be prohibited over areas of the sea beyond 3 miles from shore ”.

This Decree, of which Article 2 only is set forth in the Appendix to the United States Case, is given at length in the Appendix to this Counter-Case. Article 1 has the following paragraph :

‘ Les pêcheurs sont tenus d’observer, dans les mers situées entre les côtes de France et celle du Royaume-Uni de la Grande-Bretagne et d’Irlande, les prescriptions de la Convention du 2 août 1839, et du Règlement International du 23 juin 1843.

This shows that French subjects only are affected; for the Government did, and could bind its subjects only by the Convention of 1839.

Article 2 is as follows :

‘ Sur la demande des prud’hommes —

The President. — A prud’homme is a sort of Alderman.

Sir Charles Russell.

‘ Sur la demande des prud’hommes des pêcheurs, de leurs délégués et, à défaut, des syndicats des gens de mer, certaines pêches peuvent être temporairement interdites sur une étendue de mer au delà de 3 milles du littoral, si cette mesure est commandée par l’intérêt de la conservation des fonds ou de la pêche de poissons de passage.

That is “ free swimming fish. ”

The President. — Yes.

Sir Charles Russell. —

‘ L’Arrêté d’interdiction est pris par le Préfet Maritime. ’

Then our Counter Case continues : —

It is not alleged in the United States’ Case that the power thus given has been acted on as against foreigners, and it is submitted that Article 2 was not intended to authorize bye-laws affecting foreigners beyond territorial limits.

The construction which supposes the Decree to apply to foreigners assumes it to assert an authority to prohibit fishing to all nations, unlimited in the selection of the kinds of fish to which the prohibition may apply, either as to their being “ located ” near French coasts, or as to their being those in which France has “ an interest, an industry and a commerce ” and assumes that the prohibition may extend to mere “ fishes of passage ” in which the interest of France is only that which it has in common with other nations, and may apply to every part of the high seas.

I omit the intervening passage : it then proceeds :

The extent to which France claims to legislate for foreign fishermen is now regulated by the Law of the 1st March 1888.

Article 1 says :

“ La pêche est interdite aux bateaux étrangers dans les eaux territoriales de la France et de l’Algérie, en deçà d’une limite qui est fixée à 3 milles marins au large de la basse mer. ”

The United States’ Case proceeds :

“ Numerous laws have also been enacted by France to protect and regulate the coral fisheries of Algeria, both as to natives and foreigners, and the coral beds so regulated extend at some points as far as 7 miles into the sea. ”

This is not verified by particulars or evidence.

If that answer is in any way incomplete, I would ask you to be good enough, Sir, to inform your colleagues what it may be necessary to know further about it.

The next case is that of the Algerian Coral Fisheries, which I have already dealt with as part of France.

The next is the Italian Coral Fisheries, referred to on page 53 of our Argument; and I will content myself with reading the observation which the Marquis Venosta was good enough to make in the course of my learned friend Mr Coudert’s argument. It will be found at page 570 of the print.

I will say in regard to the observation of Mr Coudert that the Italian Decrees do not apply to foreigners. The three Decrees cited in the Case of the United States are an addition to the Regulation of November 13th, 1882, which is made to apply the law of March 4th, 1877, on fishing, and this law in its 1st article as well as the Regulations limits their zone of application to the territorial waters. The coral Banks of Sciacca where fishery was forbidden for some time, are outside the territo-

rial waters ; so those Decrees were not applicable to foreigners if they went there ; but the industry, in fact, is exclusively carried on by Italian citizens. I must add however that this prohibition has now been repealed.

Mr Coudert. — Yes, I was coming to that question, — the distinction between citizens and foreigners, and the privilege that the rule would give to foreigners over citizens. Of course, if as the Arbitrator says, and I desire to be instructed by him.

Marquis Visconti Venosta. — It is a question of fact.

Marquis Visconti-Venosta. — The question of fact is that this does not apply to foreigners.

Sir Charles Russell. — Then we have next the Norwegian Whale Fisheries, which are mentioned in the Case of the United States, but not referred to in the Argument of my learned friend, Mr Phelps. We have, at page 96 of our Counter Case, dealt with that matter.

As to Norway, the United States Case says that the principle of contention (3)

of the United States as set out at page 74, which I will refer to in a moment

is recognised in a Statute for the protection of whales, “ in Varanger Fiord, an arm of the open sea about 32 marine miles in width. ” There is nothing in the Norwegian laws set forth in the Appendix to the United States Case to show that they apply to foreigners at all. If they do, then, as regards Varanger Fiord, the question may be whether or not it belongs to the “ inner waters ” of Norway.

Mr Gram. — I should only wish to say it is quite true there is nothing in the Norwegian Law which expressly shows that it is intended to apply to foreigners ; but, as a matter of fact, it is directed against foreigners as well as against Norwegian citizens, — the Fiords are considered to be interior waters as a rule.

Sir Charles Russell. — Yes. As a matter of fact, I believe, I am right in saying that no question has ever arisen as to the necessity of applying as against foreigners any principle of exclusion.

Mr Gram. — I beg your pardon. Norway has applied the principle against foreign subjects in that part of the country.

Sir Charles Russell. — I was not aware of that. Perhaps you will be good enough, sir, to tell the Arbitrators the result of the contention.

Mr Gram. — It has always been maintained that the Fiords are inner waters against foreigners as well as against Norwegians.

Sir Charles Russell. — The statement in the Argument is that if the law applies to foreigners, and is put in force against foreigners, then as regards the Varanger Fiord, the question is whether it does or does not belong to the inner waters of Norway or fall within the principle of land-locked waters.

Lord Hannen. — And it turns entirely on that, Sir Charles. The question is solely whether these are interior waters.

Senator Morgan. — What is the width of these interior waters, or fiords?

Sir Charles Russell. — I have just read it, Sir. It is 32 miles.

Senator Morgan. — That must be a good way from the three mile limit, somewhere.

Sir Charles Russell. — Yes.

Senator Morgan. — It is the Norwegian construction of the three mile limit.

Mr Gram. — The distance is calculated from the mouth of the fiords.

Sir Charles Russell. — I think I may remind Senator Morgan that there are bays on the American coast — Delaware Bay for instance — which have been claimed by the United States as coming within that principle of inner waters, land-locked waters, although they are wider at the mouth than Varanger Fiord.

Senator Morgan. — I know of no case in which that question has been brought up between the United States and any foreign Government.

Sir Charles Russell. — That is another matter. I was merely suggesting that; and I think Senator Morgan will admit the impeachment.

The President. — This all shows that we must be extremely prudent.

We will not attempt to define what is meant by territorial waters; and I believe indeed that question is not before us.

Lord Hannen. — I think, Sir Charles, you will find it was brought up with reference to the Bay of Fundy, before an Arbitration of which I have some knowledge; and it was decided that the Bay of Fundy could not be claimed by England. The United States disputed it.

Senator Morgan. — Because there is an American island in the Bay of Fundy.

Sir Charles Russell. — However, as the learned President has said, it does not touch this question, because it is not put as an extension of jurisdiction beyond the three mile limit; but it is based upon the assertion, right or wrong, that it is inner or land-locked waters of the territory. Whether that contention is right or wrong, it is not necessary to consider. The illustration, whatever the case is, does not help the argument put forward.

The next reference, Sir, is to Panama, which is referred to on page 165 of the Argument of the United States, where my friend says :

Similar restrictions upon the pearl fisheries in the open sea have been likewise interposed by the Government of Colombia.

A decree by the governor of Panama in the United States of Colombia, in 1890, prohibited the use of diving machines for the collection of pearls within a section of the Gulf of Panama, which is between 60 and 70 marine miles in width, and of which the most remote point is 30 marine miles from the main land.

From the map which is referred to and set out at page 484 of the First Volume of the Appendix to the Case of the United States, it would appear that there are two gulfs in the Bay of Panama, and not one as might be gathered from the above statement, and that both, or at least one of them, may fall within the principle of embayed waters.

Our comment upon this matter at page 96 of the Counter Case is this.

The law of Panama next referred to applies, and is alleged to apply, only to pearl fisheries as to the title or want of title to which, or their proximity to islands or coast, or whether in inland waters, nothing is said. Nor is there anything to show that the law in question applies to foreigners.

The assertion in the United States' Case as to the area affected by the law is unsupported by evidence; and it will be observed that the Map of the Panama pearl fisheries in the Appendix, does not purport to come from the Panama Government, but to be "prepared at the office of the Coast and Geodetic Survey". From what materials it was so prepared is not explained; and as it refers to a Decree of 1890, and is not dated, it may be supposed to have been made for exhibition to the Tribunal of Arbitration.

No doubt the map is honestly enough made for the purposes for which it is intended; but it is not an official map, and it does not supply data which would enable one to judge of the exact weight to be attached to it.

The Tribunal here adjourned for a short time.

Sir Charles Russell. — Mr President, I am glad to say that, in reference to that matter of the legislation in relation to the purse seine and mackerel fishery, my friends Mr Tupper and Mr Foster are both right. Mr Foster is right in saying that the convention entered into is general. My friend Mr Tupper is right in saying that the occasion of its being entered into was in relation to the purse seine. It stands thus : That on the 22nd of May, 1890 the Canadian Government asked that the United States Government might be communicated with, with a view of obtaining some international legislation, either for the purpose of prohibition or of restriction of the use of the purse seine in the mackerel fishery, in order that, for the general good, the impending danger to this valuable industry might be averted.

That was the subject for discussion; and ultimately the Convention entered into resulted in an arrangement for the appointment of a commission to consider and report concerning the regulations, practice and restrictions proper to be adopted in concert, with regard to, among other things :

The limitation or prevention of exhaustive or destructive methods of taking fish and shell-fish in the territorial and contiguous waters of the United States and Her Majesty's possessions in North America respectively, and also in the waters of the open seas *outside the territorial limits* of either country to which the inhabitants of the respective countries may habitually resort for the purpose of such fishing.

It was therefore made by Convention a matter which was, when it came to any further head, to be given effect to by legislation by either country so as to bind its own nationals.

Senator Morgan. — That process of purse seine fishing, Sir Charles, allow me to say, was the invention of the people of the United States and was practised by them; and both the Government of the United States and the Government of Canada thought it ought to be given up.

Sir Charles Russell. — I presume, Sir, like many other inventions of the United States it was used by others than the people of the United States — that it was used by both Canadian and United States fishermen.

Senator Morgan. — It was commonly used by both ; yes.

Sir Charles Russell. — Now, sir, I left off at page 54 of the British Argument; and the only one of these cases of fishery remaining is the Mexican Pearl Fisheries. That was referred to in the United States Case, but is not referred to in their Argument. I will content myself therefore with reading from page 96 of the British Counter Case, which states what the facts are, which are not contradicted.

The facts stated with reference to these pearl fisheries are not verified by evidence. The Mexican Regulations appear only to refer to “ the waters of the Republic; ” and even then foreigners are admitted to the fisheries on complying with certain Regulations as to registration and payment of tonnage and lighthouse dues.

It is worth observing that, although Mexican legislation is adduced in the United States’ Case as an example of the exercise of jurisdiction outside the 3-mile limit, yet in setting out the Regulations of 1874 in the Appendix, those relating to the boundaries of the fishing districts are omitted.

As showing that Great Britain has not consented to the exercise of fishery jurisdiction by Mexico beyond the ordinary limit, reference may be made to the Treaty of the 27th November, 1888, between Great Britain and that country, of which the last paragraph of Article IV is as follows : —

The two Contracting Parties agree to consider, as a limit of their territorial waters on their respective coasts, the distance of 4 marine leagues reckoned from the line of low-water mark. Nevertheless, this stipulation shall have no effect, excepting in what may relate to the observance and application of the Custom-house Regulations and the measures for preventing smuggling, and *cannot be extended to other questions of civil and criminal jurisdiction or of international maritime law.*

Now, Sir, I have come to the end of the examples as regards fishery laws; and I have next to draw attention to the general principles of the applicable to legislation of this class, as set out on page 55 of the Argument, where we say : —

Throughout the foregoing discussion of the legislation of various nations, certain principles of law have been referred to, the full explanation of which had necessarily to be postponed until the examinations were completed.

For convenience these principles will now be collected, and will then be separately examined :

(I) That by the universal usage of nations, the laws of any state have no extra-territorial application to foreigners, even if they have such application to subjects.

(II) That Great Britain has incorporated this principle into her own law by a long-established usage, and a series of decisions of her Courts; and that the law of the United States is identical.

(III) That the British Colonies have no power to legislate for foreigners beyond the colonial limits.

(IV) That international law has recognized the right to acquire certain portions of the waters of the sea and the soil under the sea, in bays, and in waters between islands and the mainland.

(V) That the analogy attempted to be traced by the United States between the claims to protect seals in Behring Sea, and the principles applicable to coral reefs and pearl beds, is unwarranted.

(VI) And, finally, that there is no complete or even partial consent of nations to any such pretension as to property in, and protection of, seals as set up by the United States.

Now, as regards the first of these points, that there is no extra-terri-

torial application of the laws of any State to foreigners, I do not feel it incumbent upon me to labour that point, because it is conceded practically, I think, by my learned friend, Mr Phelps, in his Argument. He admits that, as laws they have no extra-territorial effect. His contention, with which I have already dealt, and to which I must recur again, is that although they have no extra-territorial effect as laws, yet they may have some effect under another denomination which my learned friend calls self-defensive or self-preservative regulations. I have, as I say, already dealt with that; but I will recur to it, momentarily at least, again.

The next proposition is that the laws of Great Britain have no extra-territorial application to foreigners. Chief Justice Cockburn, in that case to which I have before referred of *the Queen v. Keyn*, states the proposition thus, on page 73 of the report :

Where the language of a statute is general and may include foreigners or not, the true canon of construction is to assume that the legislature has not so enacted as to violate the rights of other nations.

And in that connection also there is a quotation from a judgment of Lord Stowell in the “ *Le Louis* ”, which I will refer to later. I will not read it now.

At the top of page 57 of our Argument, a case is referred to which is not unimportant, in which Lord Justice Turner, a Judge of the Appeal Court, says :

“This is a British Act of Parliament, and it is not, I think, to be presumed that the British Parliament could intend to legislate as to the rights and liabilities of foreigners; in order to warrant such a conclusion, I think that either the words of the Act ought to be express or the context of it very clear.”

And again Baron Parke, in *Jeffreys v. Boosey*, said :

“The Legislature has no power over any person except its own subjects, that is, persons natural-born subjects, or resident, or whilst they are within the limits of the kingdom; the Legislature can impose no duties except on them, and when legislating for the benefit of persons must *prima facie* be considered to mean the benefits of those who owe obedience to our laws, and whose interest the Legislature is under a correlative obligation to protect.”

There is a remarkable illustration of this in the case referred to of *ex parte Blain, re Sawers* :

The question arose as to the application of the English Bankruptcy Law to foreigners in England; the definitions of acts of bankruptcy in the Statute include the commission of certain acts “ in England or elsewhere; ” yet it was held by the Court of Appeal that a foreigner in England, although on general principles he was subject to English law, could not be made bankrupt unless he had committed an act of bankruptcy in England. The words “ or elsewhere ” were held not to apply to such a foreigner on the principles above stated.

I have already referred to the case of *Queen v. Keyn*, and I will not repeat the reference to that case.

The next principle adverted to is that the Colonies have no power of

extra-territorial legislation for foreigners. That principle follows from the one which I enunciated early this morning, namely, that these colonial Legislatures are acting under a delegated authority, an authority delegated to them by the Imperial Parliament and that they have no power to bind any one outside their own territory. A very remarkable illustration of that is mentioned at page 58 in the case of *Macleod v. Attorney General for New South Wales*, which arose in this way. The charge was that Macleod had committed bigamy. The local statute enacted that :

“Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years.”

Here were general words similar to the words “any person”, so much relied on by the United States.

The Judicial Committee nevertheless rejected their general application. They said :

“The colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and indeed inconsistent with the most familiar principles of international law....

The words ‘whosoever being married’ mean whosoever being married and who is amenable at the time of the offence committed to the jurisdiction of the colony....

“Wheresoever” may be read, “Wheresoever in this colony the offence is committed.”

So that although the words of the statute were “whosoever being married” — without any limitation of place — “marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years” — where the first marriage had taken place inside the colony, and the second marriage outside it, it was held that the man could not be convicted under the terms of that section for bigamy.

The case is reported in the “Appeal Cases” of the Law Reports for 1891, at page 445. I have the case before me and it is at the disposition of any of the tribunal who desire to read it. The considered judgment of the Court was delivered by the late Lord Chancellor. On page 458, he says :

The result as it appears to their Lordships must be that there was no jurisdiction to try the alleged offender for this offence, and that this conviction should be set aside. Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at bar, it would have been beyond the jurisdiction of the Colony to enact such a law. Their jurisdiction is confined within their own territories and the maxim which has been more than once quoted, “*extra territorium jus dicenti impune non paretur*” would be applicable to such a case.

Then, Mr President, follows a statement on page 59 of our Argument of those cases where the law does recognize the right of a State to acquire certain portions of the water of the sea and of the soil under the

sea, and to include them within its territory; I do not stop to dwell upon them because I do not conceive it necessary, but they will all be found to be cases which are either defensible as being bays or within a headland offing, or being simply portions of contiguous sea as to which possession, or what was treated as possession, has been acquired.

Then at the bottom of page 59, and on page 60, there is a brief consideration of the point of whether there can be said to be any analogy between the claim to property in and to protect free-swimming animals, such as fish and seals, and a like claim in respect of oysters which have a fixed *locus*, or coral beds which have a fixed *situs*: but I do not propose to trouble you with dwelling upon that subject. I have so frequently enunciated the principle that I do not desire to do more than refer to it in the words of Chief Justice Cockburn in that case of *Queen v. Keyn*, which is a case deserving of notice on many grounds, first because of the examination of the general law to which many judicial minds on that occasion applied themselves, but also because the case itself was a remarkable illustration of the regard paid by the law of England to that principle of strictly confining a law of a country to the territorial limits of that country. What was that case? It was the case of an offence supposed to have been committed within three miles of the coast, and therefore within the narrowest limit fixed as the territorial zone; and yet the majority of that Court declined to affirm the proposition that the Courts of Great Britain had jurisdiction, without legislation, to deal with an offence committed within the three mile limit: it was a very remarkable illustration of the tenacity with which that principle is observed.

On the next page of our Argument, page 60, we recur to the argument on the “ Hovering Acts ”, as to which, incidentally, I shall have to say a word presently in connection with a case to which I shall call attention. The Quarantine Acts have already been dealt with, and I do not trouble the Tribunal with that matter.

I therefore invite the Tribunal on this part of the case to arrive at the conclusion that the assertion by the United States that the practice of nations supports the claim now put forward is without foundation. If it is regarded as an assumption of jurisdiction on the high sea, it was entirely beyond the power of the United States’ Congress to pass the act applying to foreigners; for, without the acquiescence of other nations, and without example in the practice of other nations, it infringes upon the rights of those nations upon the high seas.

If, on the other hand, it is to be regarded as part of the general jurisdiction exercised by the United States over Behring Sea, it was also beyond the power of the United States to make the act apply to foreigners; for, without the consent of other nations, and without example in the practice of other nations, it extended the territorial waters of the United States to a limit hitherto unknown and unrecognized, and in so doing, it infringed upon the rights of other nations upon the high seas.

I have already dealt with the other view in which this question is put,

and, as I have said, I must recur to it, namely, the so-called self-preservative or self-defensive regulations. Therefore I claim that the answer to the fifth question ought to be, as given on page 63 of our Argument, namely :

That the United States have no right (*a*) of protection, or (*b*) of property, in the seals frequenting the islands of the United States in Behring Sea when they are found outside the ordinary 3-mile limit.

There is one other case, to which I must make an allusion. That is the exceptional case of the St. Helena Act of 1815, the history of which, no doubt, Sir, is in your mind. I think I may content myself with reading what is said in the Argument upon it. Mr Blaine, you will recollect in one of his earliest dispatches, which is set out in the first volume of the United States Appendix, at page 283, refers to this Act, and says : — Here is an island in mid-ocean, and the Government of Great Britain assumed an authority and power to exclude the commerce of nations from the approach to that island for its own political ends, an assumption of jurisdiction and of authority much greater than they allege we are claiming in this case.

The facts are shortly and correctly set out at page 61 of our argument; and I have got before me, in order to supplement that statement, a copy of the Articles of the Treaty upon the subject, signed in Paris, on the 2nd of August, 1815, authorizing this exceptional Act. The statement in the Argument is this :

At the peace of 1815 it was determined by Great Britain in conjunction with the allied Powers, that St. Helena should be the place allotted for the residence of the Emperor Napoleon Buonaparte, under such regulations as might be necessary for the perfect security of his person; and it was resolved that, for this purpose, all ships whatever.—

Mr Justice Harlan. — It was resolved by whom; by the parties to that Treaty?

Sir Charles Russell. — The parties to this Treaty; yes. You will see in a moment, sir. I have got before me a copy of the Articles of 1815.

And it was resolved that for this purpose, all ships whatever, British and foreign, excepting only the East India Company's ships, should be excluded from all approach to the island. Notice was accordingly given by the British Chargé d'Affaires at Washington to the United States Government on the 24th November, 1815, that a Treaty of Commerce between Great Britain and the United States, dated the 3rd July, 1815, under Article III of which liberty of touching for refreshment at the island was given to United States vessels, could not be carried out in this respect; and that the ratifications of the Treaty would be exchanged under the explicit declaration that United States vessels could not be allowed to touch at, or hold any communication whatever with, the island, so long as it should continue to be the residence of the Emperor. The Treaty was ratified on this understanding.

So that, so far as the United States was concerned, although not a party to the Treaty itself, it assented to that, and ratified a Treaty of Commerce with Great Britain on the express stipulation that that Treaty

should be subject to the effect of the arrangement which I am now about to explain. So far, therefore, as the United States is concerned, that is the position of things. Now, how do the matters stand as regards the other Powers? The Articles of the Treaty which bear upon this matter are in these terms :

ART. 1. Napoleon Buonaparte is considered by the Powers who have signed the Treaty of the 25th of March as their prisoner.

ART. 2. His custody is especially entrusted to the British Government. The choice of the place and of the measures which may best secure the object of the present stipulation are reserved to his Britannic Majesty.

That is the Treaty of the other Powers. Now, is it not enough to say —
Mr Phelps. — What are you reading from, Sir Charles?

Sir Charles Russell. — The Articles of the Treaty.

Mr Phelps. — What Treaty?

Sir Charles Russell. — The Treaty between the Powers, by whom the charge of the Great Emperor was committed to the British Government.

Mr Phelps. — Is that in the Case anywhere?

Sir Charles Russell. — No ; it is not in the Case ; but it is not material that it should be in the Case. I am reading a historic document. But surely, it is enough to say about this matter, without more, that it is no reference, no guide to this Tribunal, and throws no light whatever upon the question that we are discussing. It was not an assertion of any general right upon the part of Great Britain. It was a case in which a number of the Powers — the allied Powers, as they were called — at the close of a long and disastrous war, took these measures, and, so far as the United States is concerned, took these measures with the implied assent of the United States.

The President. — Was that assented to by the United States?

Sir Charles Russell. — Yes. I have read, Sir, the grounds upon which I base that argument. The matter stood thus : The United States and Great Britain had entered into a Treaty of commerce. Before the ratification of that Treaty, when it would become binding upon both the Powers, this arrangement as to the custody of the Great Emperor was entered into by the Allied Powers. Upon that, communication is made by the British Government to the United States Government, and they are told, “ We can only ratify the Treaty subject to your recognizing that you have no longer the right to touch at St. Helena, or to go within a stipulated distance of it. ”

The President. — And that communication was accepted?

Sir Charles Russell. — That communication was accepted, and the Treaty ratified after that communication was made. Therefore it does not lie in their mouth to say that that was something they were obliged to do, or which was put upon them by compulsion.

Senator Morgan. — I think the United States might be justly credited with having accepted and admitted, in that arrangement, the proposition

that the great nations of the earth, in providing for their security and the security of their political rights, could impose upon other Powers a recognition of this exception that they had made in the open sea for the security of the Emperor Napoleon; and so they could make an exception of like character for the security of any great industry or any great enterprise, or any other thing that would concern the affairs of the whole commercial world.

Sir Charles Russell. — If I may respectfully say so, Sir, there is a great chasm between the premise and the conclusion.

Senator Morgan. — I do not happen to see it.

Sir Charles Russell. — To answer it in detail, Mr Senator, would indeed cause a very wide deviation from my path.

Lord Hannen. — I was going to ask what was the effect of the restraint. I think it was only this. All vessels were forbidden to touch at the islands.

Senator Morgan. — A little more.

Lord Hannen. — I was going to add, and the rest is analogous to the Hovering Acts. There was nothing to prevent vessels sailing through the waters adjoining St Helena; but they were not allowed to hover in those waters.

Senator Morgan. — I beg your pardon. They were not allowed to approach within fifteen miles.

Sir Charles Russell. — I rather thought the distance was more than fifteen miles.

Senator Morgan. — It may be more, but it is at least that.

Lord Hannen. — I was only inviting you to give us the terms, which are not in my recollection.

Sir Charles Russell. — I thought we had it in the United States Case, but we have not.

Senator Morgan. — It was 26 miles, was it not?

Sir Charles Russell. — I have got a note from the Archivist of the Dominion of Canada, Mr Brymner, and there is no reason why I should not read the whole of it. My friend will have no objection, probably.

Mr Phelps. — You will find the Act, Sir Charles, on page 495 of the first Volume of the United States Appendix.

Sir Charles Russell. — There is only a part of the Act, I think, set out there Mr Phelps.

Mr Phelps. — All that touches this point. Section 4, is there.

Sir Charles Russell. — Then I had better read it :

IV. And be it further enacted. That it shall and may be lawful to and for the Governor, or in his Absence the Deputy Governor of the said Island for the time being, or for the Commander for the time being of His Majesty's Naval or Military Forces stationed off or at the said Island, respectively, and the Persons acting under his or their Orders and Commands, respectively, by all necessary Ways and Means to hinder and prevent any Ship, Vessel, or Boat, Ships or Vessels, or Boats (except Ships and Vessels of and belonging to or chartered by the said United Company of Merchants, also duly licensed by the said Company for that Purpose, as hereinbe-

fore mentioned), from repairing to, trading, or touching at the said Island, or having any Communication with the same; and to hinder and prevent any Person or Persons from landing upon the said Island from such Ships, Vessels or Boats, and to seize and detain all and every Person or Persons that shall land upon the said Island from the same; and all such Ships, Vessels or Boats (except as above excepted) as shall repair to, or trade, or touch at the said Island, or shall be found hovering within Eight Leagues of the Coast thereof.

Lord Hannen is quite right.

And which shall or may belong, in the Whole or in Part, to any Subject or Subjects of His Majesty, or to any Person or Persons owing Allegiance to His Majesty, shall and are hereby declared to be forfeited to His Majesty, and shall and may be seized and detained, and brought to *England*, and shall and may be prosecuted to Condemnation by His Majesty's Attorney General, in any of His Majesty's Courts of Record at *Westminster*, in such manner and form as any Ship, Vessel or Boat may be seized, detained, or prosecuted for any Breach or Violation of the Navigation or Revenue Laws of this Country; and the Offence for which such Ship, Vessel or Boat shall be proceeded against shall and may be laid and charged to have been done and committed in the County of *Middlesex*; and if any Ship, Vessel or Boat not belonging, in the Whole or in Part, to any Person or Persons the Subject or Subjects of or owing Allegiance to His Majesty, his Heirs and Successors, shall repair to or trade or touch at the said Island of *Saint Helena*, or shall be found hovering within Eight Leagues of the Coast thereof, and shall not depart from the said Island or the Coast thereof when and so soon as the Master or other Person having the Charge and Command thereof shall be ordered so to do by the Governor or Lieutenant Governor of the said Island for the time being, or by the Commander of His Majesty's Naval or Military Force stationed at or off the said Island for the time being (unless in case of unavoidable Necessity, or Distress of Weather), such Ship or Vessel shall be deemed Forfeited.

Lord Hannen. — There is no restriction against sailing through the waters. It is only against hovering.

Sir Charles Russell. — None at all.

And shall and may be seized and detained and prosecuted in the same manner as hereinbefore enacted as to Ships, Vessels or Boats of or belonging to any Subject or Subjects or His Majesty.

You will see how wery strained and exaggerated is the reference by Mr Blaine in the letter to which I have referred, which is that enormously long letter of the 17th of December, 1890. It covers some 27 pages, but the passage in question is on page 283. The first part of it admits the point I have just mentioned.

Before the ratifications of the treaty were exchanged, in the following November, it was determined that Napoleon should be sent to St. Helena. England thereupon declined to ratify the treaty unless the United States should surrender the provision respecting that island. After that came the stringent enactment of Parliament forbidding vessels to hover within 24 miles of the island. The United States was already a great commercial power. She had 1,400 000 tons of shipping; more than 500 ships bearing her flag were engaged in trade around the capes. Lord Salisbury has had much to say about the liberty of the seas, but these 500 American ships were denied the liberty of the seas in a space 50 miles wide in the South Atlantic Ocean by the express authority of Great Britain.

I say that is not correct at all; that all they were prohibited from doing

was to hover there. There was nothing to prevent them sailing within three miles of the coast, if they were proceeding upon their voyage.

Mr Justice Harlan. — When he uses the word « liberty » there, he means the right to use the island in the ordinary way upon terms of equality ; and the Act does prevent other vessels from trading.

Sir Charles Russell. — But this would convey to the ordinary reader, Mr. Justice Harlan with great deference, that there was an exclusion by their being denied the liberty of the seas for that space of 50 miles. He is reckoning there 25 miles on each side of the island. He conveys the idea that there is an exclusion from that distance. There is nothing of the kind. What the mandate, or whatever it is to be called, amounts to is a prohibition against landing and a prohibition against hovering within that distance ; but if a vessel is upon its journey east or west, there is nothing to prevent its sailing as close to the island as it wishes — nothing whatever.

But I need not say that an exceptional case, under exceptional circumstances, forms no precedent whatever.

Now may I in this connection, as it has come up, again reiterate what I have before said : that these isolated instances of assertion, well or ill founded, prove nothing as to what is the rule or principle of international law. The principle of what is international law is well stated by the late Chief Justice Cockburn at page 63 of the report of his judgment.

He is applying it to the question of the three mile zone, and treating that still as, to some extent, an undetermined matter.

And when in support of this position, or of the theory of the three-mile zone in general, the statements of the writers on international law are relied on, the question may well be asked — upon what authority are these statements founded ? When and in what manner have the nations who are to be affected by such a rule as these writers, following one another, have laid down, signified their assent to it ? — to say nothing of the difficulty which might be found in saying to which of these conflicting opinions such assent had been given.

For, even if entire unanimity had existed in respect of the important particulars to which I have referred, in place of so much discrepancy of opinion, the question would still remain, how far the law as stated by the publicists had received the assent of the civilized nations of the world ? For writers on international law, however valuable their labours may be to elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express — as by treaty, or the acknowledged concurrence of governments — or may be implied from established usage — an instance of which is to be found in the fact that merchant vessels on the high seas are held to be subject only to the law of the nation under whose flag they sail, while in the ports of a foreign state they are subject to the local law as well as to that of their own country. In the absence of proof of assent as derived from one or other of these sources, no unanimity on the part of theoretical writers would warrant the judicial application of the law on the sole authority of their views or statements.

Nor, in my opinion would the clearest proof of unanimous assent on the part of other nations be sufficient to authorize the tribunals of this country to apply without an Act of parliament, what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legisla-

tion in a matter otherwise within the sphere of international law; but it would be powerless to confer, without such legislation, a jurisdiction beyond and unknown to the law, such as that now insisted on, a jurisdiction over foreigners in foreign ships on a portion of the high seas.

Now I am glad, Mr President, to have made considerable progress, and to have gone a long way towards getting to the end of this argument; but there are still some matters with which I must trouble you. There are three cases referred to by my friend, Mr Phelps, in his Argument, which deserve consideration by themselves. They are the cases of *Church v. Hubbard*; *Rose v. Himely*; and *Hudson v. Guestier*.

Now the case of *Church v. Hubbard*, of which both Mr Phelps and Mr Carter made some use in their arguments, when you come to consider it, is really about the simplest case in the world; and, if I may be allowed to say so of so great a Judge as Chief Justice Marshall, it was so simple a case that I am surprised that he found himself able to make an important judicial utterance depend upon it.

Now I will tell the Court what the case was. It was not a case involving the question of international rights as between nations, at all: it was a case between a man who had insured his ship "the Aurora" and an underwriter, who was the insurer; and in the policies of insurance there was an exception from the general risk which the underwriter undertook. I am now speaking with the report in the 2nd of Cranch's Reports, page 187, before me. There were two policies of insurance; in each case there was excepted from the general risk which the underwriter undertook, these words: in one policy "The insurers are not liable for seizure by the *Portuguese* for illicit trade." In the other "The insurers do not take the risk of illicit trade with the *Portuguese*." And it was held (and I think quite rightly held), that those two exceptions meant the same thing. The sole question, therefore, in determining whether the underwriter was liable or not, was whether the seizure of a ship, which was in fact seized by the Portuguese authorities, was to be regarded as a seizure by the Portuguese authorities for engaging in illicit trade, or whether it was to be regarded as an unjustifiable and gratuitous act of maritime trespass. That was absolutely the sole question in the case.

Now the Portuguese Government had forbidden trade with particular ports in its dominions, and the facts found by the Judge who enquired into them, in order to ascertain whether the vessel was seized for illicit trade, are set out at page 192, where it is stated that in consequence of the acts of examination made on board the brig Aurora, and of questions put to her Captain, and so on, the Judge comes to the conclusion that

The motives hereby alleged for having put into a port of this establishment are unprecedented, and inadmissible, and the causes assigned cannot be proved.

It was alleged that she had gone in there for water or some other

need, and not for illicit trade. The Judge came to the conclusion that that was not true. He says : —

I therefore believe it to be all affected for the purpose of introducing here commercial and contraband articles of which the cargo is composed ; (if there are not other motives besides these, of which there is the greatest presumption.

And then the Judge of First Instance proceeds to justify that by a further examination of the case ; and he finally comes to the conclusion that if it had only been their intention to look for the same coast, then it is presumed he was making for it for the purpose not of business, but of smuggling.

Now that being the state of the case, it is argued on the one side that the seizure was not one which, by the strict letter of the Portuguese law, was authorized, or by international law was authorized, because the vessel had not gone into ports trade with which was forbidden, and was anchored some four leagues off the coast ; although the master had gone in, as alleged, for the purpose of making arrangements for this illicit trade, it was argued that as the ship was seized beyond the three mile limit it was practically an act of maritime trespass.

The learned Judge deals with that in a way that I will call your attention to. The argument is enormously long, and the judgment, which resembles it, is at page 231. On page 232 Chief Justice Marshall says : —

The words of the exception in the first policy are : The insurers are not liable for seizure by the Portuguese for illicit trade.

Then he repeats the words in the second policy ; and then he says : —

For the plaintiff it is contended, that the terms used require an actual traffic between the vessel and inhabitants, and a seizure in consequence of that traffic, or at least that the vessel should have been brought into port in order to constitute a case which comes within the exception of the policy.

It was a question upon the policy. Then he goes on : —

But such does not seem to be the necessary import of the words. The more enlarged and liberal construction given to the defendants, is certainly warranted by common usage.

Then he goes on : —

In this case the unlawfulness of the voyage was perfectly understood by both parties.

That is to say, you the underwriter knew the unlawfulness of the trade which you were not going to take upon yourself the consequence of ; you the assured knew the unlawfulness of the particular trade of which you agreed you would take upon yourself the risk and would not put it upon the underwriter.

Then he goes on to say :

That the crown of Portugal excluded, with the most jealous watchfulness, the

commercial intercourse of foreigners with their colonies, was probably, a fact of as much notoriety as that foreigners had devised means to elude this watchfulness, and to carry on a gainful but very hazardous trade with those colonies. If the attempt should succeed, it would be very profitable, but the risk attending it was necessarily great. It was this risk which the underwriters, on a fair construction of their words, did not mean to take upon themselves. "They are not liable", they say, "for seizure by the Portuguese for illicit trade". They do not take the risk of illicit trade with the Portuguese; now this illicit trade was the sole and avowed object of the voyage, and the vessel was engaged in it from the time of her leaving the port of New-York.

Therefore, really, as it seems to me, this matter might have ended there, and it did not require to examine whether or not the thing could be said to be strictly defensible or justifiable by international law, to make the risk one within the contemplation of both parties to the contract, and one which the underwriter never intended to take upon himself, and which the assured never thought the underwriter was taking upon himself. No doubt, the learned Judge does go more widely into the question, and he does on page 234 examine the power of nations within and without their territory, but in a way which, it seems to me, so far from helping, disproves the contention which my learned friends are submitting, as I think you will see.

The learned Judge says :

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the *Aurora*, and that this seizure is, on that account, a mere marine trespass, not within the exception, cannot be admitted. To reason from the extent of protection a nation will afford to foreigners to the extent of the means it may use for its own security does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory.

Upon this principle the right of a belligerent to search a neutral vessel——

Here we get at once to belligerent rights——

On the high seas for contraband of war is universally admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy : so too a nation has a right to prohibit any commerce within its colonies. Any attempt to violate the laws made to protect this right, is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same in all times and in all situations, If they are such——

this is the part which is conclusive against the suggestion of right which my learned friend is making——

if they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exertions. If they are such as a reasonable and necessary to secure their laws from violation they will be submitted to.

And again :

Thus in the channel, where a very great part of the commerce, to and from all the north of Europe, passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade, must necessarily be restricted to very narrow limits ; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the Government may be extended somewhat further ; and foreign nations submit to such regulations as are reasonable in themselves and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions.

If this right be extended too far, the exercise of it will be resisted.

Again, the principle is stated, which I have already enunciated, and which will be found again and again echoed in the text writers, this being a question of the protection of revenue laws, the whole jurisdiction or assertion of authority is not based on the absolute right of one nation to put that authority in force, but on the fact that if the regulations are reasonable, and are recognized as such by the authority of the country against whose nationals they are to be enforced, they will be assented to ; but if they are extended too far, they will be resisted. It is not the assertion of an absolute right — it is the assertion of a qualified measure of protection depending, for its sufficient exercise, upon assent.

Now the rest of the judgment I need not trouble the Tribunal with, because it has no bearing upon the point with which I am concerned. There is also another reason for dismissing it as an authority upon this question, that it was not necessary to the decision whether the risk was within the policy or, not for that alone was the point to be determined, and it was to be determined by municipal law.

Now I come to the two cases of *Rose v. Himely*, and *Hudson v. Guestier*, I have spent some hours with the assistance of my friends, Mr Box and Mr Piggott, in trying to get at the meaning of these cases which occupy a very considerable space in the Reports, but when you come to the bottom of them they will be found really to be of very little help indeed to this Tribunal. Now I will try shortly to explain what these cases were. The case of *Rose v. Himely* was a claim to a cargo of coffee and the then owner and possessor of the coffee claimed his title to it under a foreign judgment of condemnation of a Court — of San Domingo, which was French territory ; and the main question discussed was whether or not the American Court could go behind the foreign judgment to examine the question of jurisdiction : whether the facts as they existed gave the Court jurisdiction to entertain the matter. Chief Justice Marshall and three of his colleagues held that they were warranted in examining the question of the jurisdiction of the Court in relation to the constitutional powers of the Court, and in relation to the situation of the thing condemned ; but the dissenting judge, Mr Justice Johnson, in a very elaborate and able judgment, dissented from those views and came to the conclusion that the principal judgment was not examinable at all ; and in the course of that judgment — indeed in the course of both judgments — a

great deal of matter is gone into by both of them a good way outside the particular point in hand. Chief Justice Marshall's judgment is rather more closely, as it seems to me, to the point; but Mr Justice Johnson's, (whose judgment is found in page 221 of the report of the case 4th volume of Cranch's Reports) may be correctly summed up in this sentence : that there was no right to inquire into the cause of capture or to review the judgment of the Prize Court, but that if there were power to go behind, then he regarded the seizure in the case in question as legitimately made and not as an enforcement of a municipal act, but as an assertion of a belligerent right. That is the sum and substance of *Rose v. Himely*.

In the case of *Hudson v. Guestier*, the question came up again, and upon substantially the same facts, because although it appears in one part of the case of *Hudson v. Guestier* that the seizure was not made, as in *Rose v. Himely*, outside the three miles, but according to one statement in *Hudson v. Guestier* was made within the three miles, yet the Judges in their judgment treat the facts as if they were similar, and nothing turns on the question whether it was inside or outside three miles.

Mr Carter. — There were two trials. On the first trial it appears to have been within the three miles, and on the second trial further out.

Sir Charles Russell. — That very likely explains how it is variously stated as a seizure *within*, and a seizure *without*, the 3 mile limit. However, the result of the case is what I desire to call attention to. The result was that the Judges in that second case took the view which Mr Justice Johnson had taken in the first, namely that the foreign judgment was not examinable. And therefore says Chief Justice Marshall at the end of the case, " My judgment in *Rose v. Himely* is therefore to be taken as overruled." That is exactly the result. I hope my friends will not differ from me about it, because we have examined it with as much care as it is possible to bestow upon it, and I think that is really what it does come to. The passage I refer to in *Hudson v. Guestier* is this —

Senator Morgan. — Was it a prize Court in San Domingo?

Sir Charles Russell. — Yes, it was a prize Court in San Domingo. The other Judges, except the Chief Justice, concurred in the judgment of Mr Justice Livingston, whose judgment was appealed from and which deals with the point whether the original judgment was examinable, and the Chief Justice observed that he had supposed that the former opinion delivered in this case upon the point had been concurred in by four Judges, but in this he was mistaken, and so on.

However, he says in conclusion, that the principle of that case of *Rose v. Himely* is now overruled.

Now I have read these cases with all possible desire to get to the bottom of them, and try and see what information they would give, by way of assistance to the Tribunal — but beyond certain expressions which are to be found in them here and there, not always quite *ad rem* to the particular points they were discussing, some in the judgment of Chief Justice Marshall and some in the judgment of Mr Justice Johnson, there is really

nothing that is of any material aid to the Court. I want however to explain to the Court how those cases were regarded by a textwriter whom we certainly, in England, consider as a textwriter of some authority — I mean Mr Dana, in his edition of Wheaton, which is an American book of authority. I observe my friend Mr Phelps in the Argument does not treat Mr Dana as being a person of very high authority. I will only observe in relation to that that his edition of Wheaton is received with respect in the English Courts; and as regards his ability and position, I can point to the fact that he was the Counsel chosen by a very able Secretary of State, himself a distinguished lawyer, to represent the interests of the United States on the Halifax Fisheries Arbitration: the Secretary of State who selected him was Mr Secretary Evarts, who is known to some of the Tribunal and known to me personally as a lawyer of distinction. Mr Evart not only selected Mr Dana, but speaking of his selection, he congratulates the United States on having been able to secure a Counsel of such distinguished eminence.

The passage I am now about to read is printed in the print handed in to the Members of the Tribunal a few days ago. It is an intelligent criticism upon the whole of this part of the law, shortly described as the “hovering principle”, if it can be designated by the name of “principle”. I refer to the note to section 180: the note being 108, and the page 208 in the 8th edition. In section 179 he refers to the exclusive territorial jurisdiction over the inclosed parts of the sea along the coast called the King’s Chambers: he proceeds:

It appears from Sir Leoline Jenkins that both in the reigns of James I and Charles II the security of British commerce was provided for by express prohibitions against the roving or hovering of foreign ships of war so near the neutral coasts and harbours of Great Britain as to disturb or threaten vessels homeward or outward bound; and that captures by such foreign cruizers even of their enemy’s vessels would be restored by the Court of Admiralty, if made within the King’s Chambers. So also the British “Hovering Act”, passed in 1736 (9 Geo. II, cap. 35), assumes, for certain revenue purposes, a jurisdiction of 4 leagues from the coasts, by prohibiting foreign goods to be transhipped within that distance without payment of duties. A similar provision is contained in the Revenue Laws of the United States; and both these provisions have been declared by judicial authority in each country to be consistent with the law and usage of nations.

His note upon that includes a criticism of *Church v. Hubbard*, and perhaps you will be good enough to allow my learned friend Mr Box to read it.

The President. — Certainly.

Mr M. H. Box. —

108. *Municipal Seizures beyond the Marine League or Cannon-shot.* — The statement in the text requires further consideration. It has been seen that the consent of nations extends the territory of a State to a marine league or cannon-shot from the coast. Acts done within this distance are within the sovereign territory. The war right of visit and search extends over the whole sea. But it will not be found that any consent of nations can be shown in favour of extending what may

be strictly called territoriality, for any purpose whatever, beyond the marine league or cannon-shot. Doubtless States have made laws, for revenue purposes, touching acts done beyond territorial waters; but it will not be found that, in later times, the right to make seizures beyond such waters has been insisted upon against the remonstrance of foreign States, or that a clear and unequivocal judicial precedent now stands sustaining such seizures, when the question of jurisdiction has been presented. The Revenue Laws of the United States, for instance, provide that if a vessel bound to a port in the United States shall, except for necessity, unload cargo within 4 leagues of the coast, and before coming to the proper port for entry and unloading, and receiving permission to do so, the cargo forfeit, and the master incurs a penalty (Act of the 2nd March, 1797, § 27); but the Statute does not authorize a seizure of a foreign vessel, when beyond the territorial jurisdiction. The Statute may well be construed to mean only that a foreign vessel, coming to an American port, and there seized for a violation of Revenue Regulations committed out of the jurisdiction of the United States, may be confiscated; but that, to complete the forfeiture, it is essential that the vessel shall be bound to, and shall come within, the territory of the United States, after the prohibited act. The act done beyond the jurisdiction is assumed to be part of an attempt to violate the Revenue Laws within the jurisdiction. Under the previous sections of that Act, it is made the duty of revenue officers to board all vessels, for the purpose of examining their papers, within 4 leagues of the coast. If foreign vessels have been boarded and seized on the high sea, and have been adjudged guilty, and their Governments have not objected, it is probably either because they were not appealed to, or have acquiesced in the particular instance, from motives of comity.

The cases cited in the authors's note do not necessarily and strictly sustain the position taken in the text. In the "Louis" (Dodson, ii, 245) the arrest was held unjustified, because made in time of peace for a violation of municipal law beyond territorial waters. The words of Sir William Scott, on pp. 245 and 246, with reference to the Hovering Acts, are only illustrative of the admitted rule, that neighbouring waters are territorial; and he does not say, even as an *obiter dictum*, that the territory for revenue purposes extends beyond that claimed for other purposes. On the contrary, he says that an inquiry for fiscal or defensive purposes near the coast, but beyond the marine league, as under the Hovering Laws of Great Britain and the United States, "has nothing in common with the right of visitation and search upon the unappropriated parts of the ocean"; and adds, "a recent Swedish claim of examination on the high seas, though confined to foreign ships bound to Swedish ports, and accompanied, in a manner not very consistent or intelligible, with a disclaimer of all rights of visitation, was resisted by the British Government, and was finally withdrawn". *Church v. Hubbard* (Cranch, ii, 187), was an action on a policy of insurance, in which there was an exception of risks of illicit trade with the Portuguese. The voyage was for such an illicit trade, and the vessel, in pursuance of that purpose, came to anchor within about 4 leagues of the Portuguese coast; and the master went on shore on business, where he was arrested, and the vessel was afterwards seized at her anchorage and condemned. The owner sought to recover for the condemnation. The Court held that it was not necessary for the defendants to prove an illicit trade begun, but only that the risks excluded were incurred by the prosecution of such a voyage. It is true that Chief Justice Marshall admitted the right of a nation to secure itself against intended violations of its laws by seizures made within reasonable limits, as to which, he said nations must exercise comity and concession, and the exact extent of which was not settled; and in the case before the Court, the 4 leagues were not treated as rendering the seizure illegal. This remark must now be treated as an unwarranted admission. The result of the decision is, that the Court did not undertake to pronounce judicially in a suit on a private contract; that a seizure of an American vessel, made at 4 leagues, by a foreign Power, was void as a mere trespass. In the subsequent case of *Rose v. Himely* (Cranch, iv, 241), where a vessel was seized 10 leagues from the French coast, and taken to a Spanish port, and condemned in a French Tribunal under municipal and not belligerent law, the Court held that any seizures for

municipal purposes beyond the territory of the Sovereign are invalid; assuming, perhaps, that 10 leagues must be beyond the territorial limits for all purposes.

In *Hudson v. Guestier* (Cranch, iv, 293) where it was agreed that the seizure was municipal, and was made within a league of the French coast, the majority of the Court held that the jurisdiction to make a decree of forfeiture was not lost by the fact that the vessel was never taken into a French port, if possession of her was retained, though in a foreign port.

The judgment being set aside and a new trial ordered, the case came up again, and is reported in Cranch, vi, 359. At the new trial the place of seizure was disputed, and the Judge instructed the jury that a municipal seizure made within 6 leagues of the French coast was valid, and gave a good title to the defendant. The jury found a general verdict for the defendant, and exceptions were taken to the instructions. The Supreme Court sustained the verdict, not, however, upon the ground that a municipal seizure made at 6 leagues from the coast was valid, but on the ground that the French decree of condemnation must be considered as settling the facts involved; and if a seizure within a less distance from shore was necessary to jurisdiction, the decree may have determined the fact accordingly; and the verdict in the Circuit Court did not disclose the opinion of the jury on that point. The Judges differed in stating the principle of this case and of *Rose v. Himely*; and the report leaves the difference somewhat obscure.

This subject was discussed incidentally in the case of the "Cagliari," which was a seizure on the high seas, not for violation of Revenue Laws, but on a claim somewhat mixed of piracy and war. In the opinion given by Dr Twiss to the Sardinian Government in that case, the learned writer refers to what has sometimes been treated as an exceptional right of search and seizure, for revenue purposes, beyond the marine league; and says that no such exception can be sustained as a right. He adds: "In ordinary cases, indeed, where a merchant-ship has been seized on the high seas, the sovereign whose flag has been violated waives his privilege, considering the offending ship to have acted with *mala fides* towards the other State, with which he is in amity, and to have consequently forfeited any just claim to his protection." He considers the Revenue Regulations of many States, authorizing visit and seizure beyond their waters, to be enforceable at the peril of such States, and to rest on the express or tacit permission of the States whose vessels may be seized.

It may be said that the principle is settled that municipal seizures cannot be made for any purpose beyond territorial waters. It is also settled that the limit of these waters is, in the absence of Treaty, the marine league or the cannon-shot.

It cannot now be successfully maintained either that municipal visits and search may be made beyond the territorial waters for special purposes, or that there are different bounds of that territory for different objects. But as the line of territorial waters, if not fixed, is dependent on the unsettled range of artillery fire, and if fixed, must be by an arbitrary measure, the Courts, in the earlier cases, were not strict as to standards of distance where no foreign Powers intervened in the causes.

In later times, it is safe to infer that judicial, as well as political Tribunals will insist on one line of marine territorial jurisdiction for the exercise of force on foreign vessels, in time of peace, for all purposes alike.

Sir Charles Russell. — This, Mr President, seems to us, as we submit, a very intelligible and very accurate criticism of the cases that are there referred to.

For the purpose of this argument I have not felt called upon to enter upon any very precise or critical examination of many points which may be said to be in a certain degree indeterminate even at the present moment. I mean, whether it can be said that the territorial waters are absolutely fixed at three miles: whether the law as to embayed waters and headlands, and various things of that kind, is perfectly clear. These

are matters as to which, unquestionably, even up to the present day, writers widely differ; but upon the question of the extent to which, territorially considered, a municipal law can operate, I cannot think that there can be any ground for difference of opinion : namely, that the statement which is attributed to that learned Judge — directed to the validity of a municipal seizure, that is a seizure under a municipal law outside three leagues from the coast — is, at least, a matter that is far from being clear.

It is very difficult to see how, if once you recognize the fact that a Statute can only operate co-terminously with the territory of the State, you can say that the municipal Statute, as of right, can operate outside by any process of law. And without expressing (for it is not my function to do it) any opinion or view upon the matter, at all events I may go so far as to say, that it is at least doubtful whether the true justification for acts done even under the so-called Hovering Acts outside the territorial limits does not rest upon the implied assent of other countries who will not interfere to protect their own nationals if they believe that those nationals have, in bad faith, been endeavouring to violate the laws of a friendly Power, — the State in question regarding those laws as just, reasonable and necessary.

Lord Hannen. — And you may add “ and having similar laws of their own ”.

Sir Charles Russell. — Yes; and having similar laws of their own.

Mr Justice Harlan. — Do you think the Courts of those countries, which passed those laws, can in administering them proceed as a matter of law upon that ground?

Sir Charles Russell. — I should hardly like to answer that question, without consideration, unless you can refer me to some case where the question has been raised in litigation. I know no case where the Power, the ship of whose national has been seized, has interposed to raise the question of jurisdiction.

I do not wish to say anything with which my judgment does not go, though, of course, I submit it not as matter of opinion but of argument; but I think, as a matter of law, as a matter of strict right, it would be exceedingly difficult to justify a seizure under a municipal Statute outside the limits of territory. This I can say; while I am not giving up any right which properly belongs to the Power I represent, as far as I know (and I have had means of enquiring into this matter), there is no case, within a reasonable period of time from the present, in which any seizure has been effected under the Hovering Acts by Great Britain which has been in any way challenged or brought into question : and no seizure at all in recent years that I am able to trace, outside the territorial limits. Whether the actual authority is greater does not matter; I only state the fact that in recent time there has been no exercise of it.

But see how far away we are from the subject that is before us. This is to be said in defence of the principle of the Hovering Acts, that they are directed against an offence against the Revenue Laws of a country to be

completed on the territory of that country; in other words, it is an offence which can be only consummated by coming within the territorial jurisdiction of the particular country.

Senator Morgan. — That is not the case in regard to the Island of Saint Helena. There the “ Hovering Act ” was for the protection of a political right, not the Revenue.

Sir Charles Russell. — I quite agree. If you ask me Senator (if I may respectfully put it so) if I will undertake to defend, upon strict legal principles, every act the Executive of the United States has done, or the Executive of Great Britain has done, or the Executive of any other great country has done, I decline the task. It is true that my learned friend, Mr Carter, was not appalled by it. He went the length of defending various things done by various Powers, and satisfied himself he could bring them all within a proper justification of ascertained legal principles.

Mr Carter. — Well, it was not quite so broad as that.

Sir Charles Russell. — I thought so, and I hoped that my learned friend was right in that. I confess I would not like to have that obligation imposed upon me.

The great point which we are here contending for, and which is the real point between us, is this; whether, in time of peace there is any justification upon the ground that the ship of one nation has got hold of a piece of property of another nation, — the right in time of peace, and outside the territorial limits upon the high seas, — for the claim to search that vessel, seize that vessel, bring it into a Prize Court, which is in fact a war tribunal, and there condemn it?

That is the question we are considering; and all these questions of the Hovering Act assist as very little indeed in that direction.

Senator Morgan. — That is a belligerent act that relates to a past transaction.

Sir Charles Russell. — It is a belligerent act, whether it relates to a past or a present transaction.

Senator Morgan. — The right claimed by the United States. is in the nature of self-defence, and relates to the prevention of a trespass immediately threatened or being consummated.

Sir Charles Russell. — Yes; but the Senator must be good enough to bear in mind those are not the facts.

The facts are the seizure of some of the vessels when the sealing was past and gone, and when they had the seal-skins on board.

Senator Morgan. — I was speaking of principles of international law, and not trying to make an application of them.

Sir Charles Russell. — Very well; but I think you will find, Sir, that even that narrow application will not do.

I now refer to those printed authorities, and if you will be good enough to take the print that has been given to you I will refer first to the case of the “ Louis ”. This was decided by Lord Stowell in 1817, and the facts that gave rise to it were these. A French ship engaged in the

slave trade was condemned, and it came before Lord Stowell upon the question whether or not it could be justified. He says :

Upon the first question, *whether the right of search exists in time of peace*, I have to observe that two principles of public law are generally recognized as fundamental. One is the perfect equality and entire independence of all distinct States. Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbour; and any advantage seized upon that ground is mere usurpation. This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their politic and private capacities, to preserve inviolate. The second is, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no one State, or any of its subjects, has a right to assume or exercise authority over the subjects of another. I can find no authority that gives the right of interruption to the navigation of States in amity upon the high seas, excepting that which the rights of war give to both belligerents against neutrals. This right, incommodious as its exercise may occasionally be to those who are subjected to it, has been fully established in the legal practice of nations, having for its foundation the necessities of self-defence, in preventing the enemy from being supplied with the instruments of war, and from having his means of annoyance augmented by the advantages of maritime commerce; against the property of his enemy each belligerent has the extreme rights of war. Against that of neutrals — the friends of both — each has the right of visitation and search, and of pursuing an inquiry whether they are employed in the service of his enemy, the right being subject, in almost all cases of an inquiry wrongfully pursued, to a compensation in costs and damages.

With professed pirates there is no state of peace. They are the enemies of every country, and at all times, and therefore are universally subject to the extreme rights of war.

Then I pass over a passage.

Another exploded practice was that of Princes granting private letters of marque against the subjects of Powers in amity, by whom they had been injured, without being able to obtain redress from the Sovereign or Tribunals of that country. But at present, under the law, as now generally understood and practised, no nation can exercise a right of visitation and search upon the common and unappropriated parts of the sea, save only on the belligerent claim.

Senator Morgan. — I agree to that.

Sir Charles Russell. — If you please. I will come to that later.

If it be asked why the right of search does not exist in time of peace as well as in war, the answer is prompt : that it has not the same foundation on which alone it is tolerated in war—the necessities of self-defence. They introduced it in war, and practice has established it. No such necessities have introduced it in time of peace, and no such practice has established it...

Piracy being excluded, the Court has to look for some new and peculiar ground; but, in the first place, a new and very extensive ground is offered to it by the suggestion, which has been strongly pressed, that this trade —

That is the slave trade :

if not the crime of piracy, is nevertheless *crime*, and that every nation, and, indeed, every individual, has not only a right, but a duty, to prevent in every place the commission of crime. It is a sphere of duty sufficiently large that is thus opened out to communities and to their members. But to establish the consequence re-

quired, it is first necessary to establish that the right to interpose by force to prevent the commission of crime commences not upon the commencement of the overt act, nor upon the evident approach towards it, but on the bare surmise grounded on the mere possibility; for unless it goes that length it will not support the right of forcible inquiry and search.

He then proceeds to consider that matter, and at the bottom of the page he continues.

It (the Court) must look to the legal standard of morality; and upon a question of this nature, that standard must be found in the law of nations as fixed and evidenced by general and ancient and admitted practice, by Treaties, and by the general tenour of the Laws and Ordinances, and the formal transactions of civilized States.

The next case was decided in 1824 by Chief Justice Marshall, and was also a slave case. He refers to the "Le Louis" and he goes on in the third paragraph :

In the very full and elaborate opinion given on this case, Sir William Scott, in explicit terms, lays down the broad principle that the right of search is confined to a state of war. It is a right strictly belligerent in its character, which can never be exercised by a nation at peace, except against professed pirates, who are the enemies of the human race. The act of trading in slaves, however detestable, was not, he said, "the act of freebooters, enemies of the human race, renouncing every country, and ravaging every country, in its coasts and vessels indiscriminately". It was not piracy.

The right of visitation and search being strictly a belligerent right, and the Slave Trade being neither piratical nor contrary to the law of nations, the principle is asserted, and maintained with great strength of reasoning, that it cannot be exercised on the vessels of a foreign Power, unless permitted by Treaty.

The next case of the "Apollon" I pass over. It has been already referred to in the discussion we had in relation to one of the illustrations given by Mr Phleps.

The next is the judgment of Mr Justice Story in "The Marianna Flora". He says :

It is necessary to ascertain what are the rights and duties of armed and other ships navigating the ocean in time of peace. It is admitted that the right of visitation and search does not, under such circumstances, belong to the public ships of any nation. This right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions. It is true that it has been held in the Courts of this country that American ships offending against our laws, and foreign ships in like manner offending within our jurisdiction, may afterwards be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication. This, however has never been supposed to draw after it any right of visitation or search. The party, in such case, seizes at his peril. If he establishes the forfeiture, he is justified. If he fails, he must make full compensation in damages.

Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all; appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption; but whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is, "*sic utere tuo, ut non alienum lædas.*"

The case of “ *La Jeune Eugénie* ” is in the same category, and I do not think I ought to trouble the Tribunal with reading it. I pass on to the case of *Buron v. Denman* which was decided in 1848.

The law on the subject of slaves has been settled—

(says Baron Parke in summing up.)

by the case of “ *Le Louis*, ” which has been referred to. That case was decided in the year 1817, by Sir William Scott, who went fully into the question of the legality of the Slave Trade, and laid down certain positions which have since been acquiesced in both in this country and abroad. Those positions are, first, that dealers in slaves are not pirates by the law of nations, and can only be made so by and according to the terms of a Treaty with the country to which they belong prohibiting the Slave Trade; secondly, that trading in slaves is not a crime by the law of nations; thirdly, that the right of stopping and searching ships in time of peace is not a right which can belong to any nation except by contract with the nation to which such ships belong; and, fourthly, that if there be a law in a particular country prohibiting the Slave Trade, it is not open to every one to punish the offender against that law, but proceedings must be taken in the Tribunals of his own country.

I have already read the Parliamentary discussion on the right of search, and I do not trouble you with it again. I have also read the the passage from Dana’s *Wheaton*.

In conclusion I read a passage from Phillimore dealing with this question of self-preservation. He says :

The right of self-preservation by that defence which prevents, as well as that which repels, attack is the next international right which presents itself for discussion, and which, it will be seen, may under certain circumstances, and to a certain extent, modify the right of territorial inviolability.

The right of self-preservation is the first law of nations, as it is of individuals. A society which is not in a condition to repel aggression from without is wanting in its principal duty to the members of which it is composed, and to the chief end of its institution.

All means which do not affect the independence of other nations are lawful for this end. No nation has a right to prescribe to another what these means shall be, or to require any account of her conduct in this respect.

The means by which a nation usually provides for her safety are : —

1. By alliances with other States;
2. By maintaining a military and naval force; and
3. By erecting fortifications and taking measures of the like kind within her own dominions.

I do not think there is any more that I need read, except on the top of the next page, paragraph CCIV.

We have hitherto considered what measures a nation is entitled to take for the preservation of her safety *within* her own dominions. It may happen that the same right may warrant her in extending precautionary measures *without* these limits and even in transgressing the borders of her neighbour’s territory. For international law considers the right of self-preservation as prior and paramount to that of territorial inviolability, and, where they conflict, justifies the maintenance of the former at the expense of the latter right.

He then proceeds to consider the cases which have already been inci-

dentially referred to : the case of ship " Caroline ", which was sent adrift in the river between lake Erie and lake Ontario. It is not necessary for me to refer to that again.

Now there is one other set of authorities to which should like to refer, and they are important because they show the position assumed by the United States upon this question, and continuously assumed by the United States as shown in the authoritative utterances of the executive head of the Government. I have a series of these utterances arranged in chronological order from the year 1843 down as late as 1880 or later.

Senator Morgan. — Do you mean the Secretary of State?

Sir Charles Russell. — In some cases the President, and in other cases the Secretary of State.

I will give the references in each case. The first is a Message from President Tyler in 1843, communicating to the House of Representatives correspondence as to the construction of the Ashburton Treaty of 1842, for, among other things, the final suppression of the African slave trade. Great Britain asserted that it authorized a mutual right of search. The United States opposed this view successfully.

This is the way the President, who formulates his message after the best legal and constitutional advice he could obtain, deals with this :

The attempt to justify such a pretension [that is, to subject the trade of the world to a system of maritime police adopted at will by a naval Power, in any places or in any articles which such Power might see fit to prohibit to its own subjects or citizens] from the right to visit and detain ships upon reasonable suspicion of piracy would deservedly be exposed to universal condemnation, since it would be an attempt to convert an established rule of maritime law, incorporated as a principle into the international code by the consent of all nations, into a rule and principle adopted by a single nation, and enforced only by its assumed authority. To seize and detain a ship upon suspicion of piracy, with probable cause and good faith, affords no just ground either for complaint on the part of the nation whose flag she bears, or claim of indemnity on the part of the owner. The universal law sanctions, and the common good requires the existence of such a rule. The right, under such circumstances, not only to visit and detain, but to search a ship, is a perfect right, and involves neither responsibility nor indemnity.

But with this single exception, no nation has, in time of peace, any authority to detain the ships of another upon the high seas, on any pretext whatever, beyond the limits of her territorial jurisdiction.

Then in 1855 Mr. Marcy, the then Secretary of State, protesting against certain orders of the British and French Governments to naval commanders to prevent by force, if necessary, the landing of adventurers, from any nation, on the Island of Cuba, with hostile intent, says :

The right of visitation and search is a belligerent right, and no nation which is not engaged in hostilities can have any pretence to exercise it upon the open sea.

The established doctrine upon this subject is that the right of visitation and search of vessels, armed or unarmed, navigating the high seas in time of peace does not belong to the public ships of any nation.

Senator Morgan. — As against the ships of any other nation.

Sir Charles Russell. — Certainly.

Senator Morgan. — Not its own.

Sir Charles Russell. — No, certainly not his own. We are talking of public ships asserting the right of visitation against ships of another nation in time of peace.

This right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions.

The undersigned avails himself of the authority and language of a distinguished writer on international law : — We again repeat that it is impossible to show a single passage of any institutional writer on public law, or the judgment of any court by which that law is administered, either in Europe or America, which will justify the exercise of such a right on the high seas in time of peace independent of special compact.

The right of seizure for a breach of the revenue laws, or laws of trade and navigation of a particular country, is quite different.

The utmost length to which the exercise of this right on the high seas has ever been carried in respect to the vessels of another nation has been to justify seizing them within the territorial jurisdiction of the state against whose laws they offend, and pursuing them in case of flight beyond that limit, arresting them on the ocean, and bringing them in for adjudication. This, however, suggests the Supreme Court of the United States, in the case before quoted, of the *Marianna Flora*, has never been supposed to draw after it any right of visitation or search. The party in such case, seizes at his peril. If he establishes the forfeiture he is justified.

Mr Justice Harlan. — Sir Charles, suppose the case of a vessel fitted out on the European side of the Atlantic Ocean, and loaded with goods for the express purpose of smuggling them into the United States in violation of its Revenue Laws; would the language of Mr Marcy go to the extent that the United States could only seize that vessel after it got within its territorial waters?

Sir Charles Russell. — Certainly, the language would; but the case that you put is undoubtedly one of the most difficult cases that one has to consider, — the most difficult. You have a vessel as to which you have information such as you suggest, that she is coming to your coasts for the express purpose of violating your laws, but is outside your three-mile limit. Are you to allow her to take the chance of darkness on a coast imperfectly guarded and to run ashore her cargo in boats in violation of your Revenue Laws? That is a question I have had to consider, and it is one of enormous difficulty. If I may express an opinion to which no value is to be attached, it would be probable in such a case, if the Executive Authority had clear and decisive information of the character that you mention, she would probably do something before the vessel got within the three-mile limit, if it was proved to be necessary, relying upon the non-interference of the State to which that fraudulent vessel belonged not to make any complaint or raise any question whether the strict territorial limits had been exceeded.

Mr Justice Harlan. — Could a Court of the United States, sitting in judgment on that act, proceed on that ground?

Sir Charles Russell. — I am a little puzzled as to that point, because

of some of the assertions made by the Supreme Court Judges in the case of *re Sayward*. Undoubtedly there are some expressions in those judgments, as there were in the judgment of the Court below, which would seem to suggest a doubt whether, if the Executive assert that they do an act under and with the authority of a particular Statute, the Court will go beyond that assertion of executive authority. As, for instance, suppose the executive authority were to assert there was extra-territorial jurisdiction, or to say it was territory for the purpose of this executive act, — it seems to me doubtful, from some of the expressions I read, whether the Judges of the United States Court would consider themselves justified in going beyond the executive act to see if it was justified. Subject to that, if it came up in an English Court, I think it would be —

Mr Justice Harlan. — Troublesome?

Sir Charles Russell. — Yes, troublesome; quite so.

The President. — In the case alluded to, if I understand it right, no Statute was invoked. They merely spoke of the action of the Executive without saying it was founded on a Statute. They said it was an action of the Executive, and it was out of their power to control it. That is what we call a separation of powers, and that is a little different from invoking a Statute.

Sir Charles Russell. — Quite so; and they also did another thing; they said, this Act of Congress treats this as territory, and the Executive have invoked this Statute and put it in force as embracing and including and applying to territory, and we cannot go beyond that.

Mr Justice Harlan. — The President having interpreted the Statute by his act?

Sir Charles Russell. — Yes.

Now, I have very little more to read; and as I shall not occupy the Tribunal very long to-morrow, perhaps I may be allowed to finish these citations before the Court rises. I want to show the continuity and consistency of these opinions. Mr Cass, the Secretary of State, writes to Mr Dallas on February the 23rd, 1859, apropos of a discussion as to the right of visit not existing in time of peace, even in the case of a slaver.

The forcible visitation of vessels upon the ocean is prohibited by the law of nations, in time of peace, and this exemption from foreign jurisdiction is now recognised by Great Britain, and, it is believed, by all other commercial Powers, even if the exercise of a right of visit were essential to the suppression of the slave trade. Whether such a right should be conceded by one nation to its co-states of the world is a question for its own consideration, involving very serious consequences, but which is little likely to encounter any prejudiced feelings in favour of the slave trade in its solution, nor to be influenced by them.

Then President Grant, in the case of the « *Virginus* », — a ship flying the United States flag, seized on the high seas near Cuba, and the crew in a very high-handed way, shot — says in his Fifth Annual Message in 1873.

It is a well-established principle, asserted by the United States from the begin-

ning of their national independence, recognised by Great Britain and other maritime Powers, and stated by the Senate in a resolution passed unanimously on 16th June, 1858, that American vessels on the high seas in time of peace, bearing the American flag, remain under the jurisdiction of the country to which they belong; and therefore any visitation, molestation, or detention of such vessels by force, or by the exhibition of force, on the part of a foreign Power, is in derogation of the sovereignty of the United States.

Finally, Mr Evarts, to whom I have already alluded, a lawyer of great eminence, in reference to the seizure of United States' ships by Spanish gunboats in non-territorial waters near Cuba, — I think there was a protest also on the part of Great Britain in reference to this matter; it was in relation to an assertion on the part of the Spanish Authorities extending 6 miles from the territory, — writes this :

It needs no argument to show that the exercise of any such asserted right [visitation and search] upon commercial vessels, on the high seas, in time of peace, is inconsistent with the maintenance of even the most ordinary semblance of friendly relations between the nation which thus conducts itself and that whose merchant vessels are exposed to systematic detention and search by armed force.

.....
This Government never has recognized, and never will recognize, any pretence or exercise of sovereignty on the part of Spain beyond the belt of a league from the Cuban coast over the commerce of this country in time of peace. This rule of the law of nations we consider too firmly established to be drawn into debate, and any dominion over the sea outside of this limit will be resisted with the same firmness as if such dominion were asserted in mid-ocean.

.....
But the distinction between dominion over the sea, carrying a right of visit and search of all vessels found within such dominion, and fiscal or revenue regulations of commerce, vessels, and cargoes engaged in trade as allowed with our ports to a reasonable range of approach to such ports, needs only to be pointed out to be fully appreciated.

Every nation has full jurisdiction of commerce with itself, until by treaty stipulations it has parted with some portions of this full control.

In this jurisdiction is easily included a requirement that vessels seeking our ports, in trade, shall be subject to such visitation and inspection as the exigencies of our trade may demand, in the judgment of this Government, for the protection of the revenues and the adequate administration of the customs service.

This is not dominion over the sea where these vessels are visited, but dominion over this commerce with us, its vehicles and cargoes, even while at sea. It carries no assertion of dominion, territorial and *in invitum*, but over voluntary trade in progress and by its own election, submissive to our regulations of it, even in its approaches to our coasts and while still outside our territorial dominion.

That is rather an ingenious suggestion in defence of the revenue jurisdiction upon another ground, namely that although the ship has not come into your actual territory, yet she is submitting to your regulations, even in her approach to the coast and while still out of territorial jurisdiction. I do not stop to defend it. I cite the passage for a different purpose.

Now I am quite content to stop here, though there is another matter I have to call attention to, namely, what is the true character of this doctrine of self-defence or self-preservation. I shall dwell for a few minutes upon it, in order to refer to one writer of authority, and of acknow-

ledged eminence. I mean Mr Hall in his book upon International Law.

The President. — Will you please yourself about that, Sir Charles.

Sir Charles Russell. — Then with your permission, Sir, I will take it to-morrow, and I will take it very shortly.

[The Tribunal then adjourned till to-morrow at 11.30.]

THIRTIETH DAY. MAY, 31ST 1893

Sir Charles Russell. — Mr President, I wish to begin by correcting an error into which I seem to have fallen a few days ago. At page 762 of the Print I find that I uttered an economic heresy. I was dealing with the question of the economic effect of the tax imposed by the United States, upon each sealskin brought into its territory, and I think I did misconceive the economic effect of that imposition. My error, which I now wish to acknowledge, was kindly pointed out to me at the time by certain questions addressed to me by you, Mr. President, by Mr Justice Harlan, and by Senator Morgan.

Another matter I also wish to set right is this. You will recollect, Mr President, that I was referring to the fact of the length of time and the extent of territory over which the Hudson's Bay Company had for many years carried on the business of collecting the skins of fur-bearing animals of all kinds including fur-seals, principally through the agency of the native population. In that correction, I stated, more widely than the facts justified me, the extent of Alaskan territory which the Hudson's Bay Company in point of fact leased from the Russian Company.

I have now ascertained what the precise facts are; and it amounts to this, that the lease which the Hudson's Bay Company had was of that part of the Alaskan territory which we have been calling, for brevity's sake, the *lisière*, or margin of coast south of the Aleutian Chain. The facts are that, in 1839, the first lease was granted for a payment in kind, consisting of, among other things, 2,000 otter skins, and certain supplies of food, and other commodities. That was a lease for 10 years. It was renewed from time to time; in 1849, in 1853, and finally continued, under one or other agreement with the Commercial Company, down to the time of the cession of Alaska by Russia to the United States in 1867. Now, with these two corrections, I pass on to the conclusion of my Argument.

Mr Phelps. — I beg your pardon, I did not understand the first one that you desired to correct.

Sir Charles Russell. — It is unimportant in the consideration of the general question. I only wanted to set myself right with the Tribunal. It was the suggestion that the imposition by the United States of the tax now amounting to some 42 shillings per skin, affected economically the price in the market. That was the point.

Now I pass on to the conclusion of this very long discussion. I said yesterday that upon this subject of the rights of self-defence or self-

preservation, as they are indifferently called, I desired to refer to one modern authority who is in complete agreement with every textwriter whom I have had the opportunity of consulting. There are none so far as I have been able to discover that differ from him.

I have examined among others Kent, Martens, Manning, Heffter, Wheaton and Twiss, and I find no discrepancy of opinion upon the subject to which I am now addressing myself, namely, what are the rights of defence, and of preservation, properly so called. The chapter which I desire to refer to particularly is in a book treated, and deservedly treated, as a book of authority in our English Courts, a book as to which I have to make my own acknowledgments of its practical utility in the actual business of my profession; I mean the Treatise of Mr Hall. Upon consideration, Mr President, and regarding the very serious demands that I have made upon the patience of this Tribunal, I have not thought it right to trouble you at this stage with any lengthened citation from it. I will, however, attempt briefly to summarize what is the principle, and the limitation of the principle, which he lays down in this connection. He deals with these rights of self-defence and self-preservation on the same principle precisely, as Mr Webster did in that despatch in relation to the "Caroline," which I have more than once referred to, that is to say, as rights which spring into existence in cases of grave and serious emergency, the occasion only covering what is essentially necessary for immediate protection. It applies to cases only where there is no opportunity of remonstrance to the other nation against whom those acts are directed; that these acts may generally be treated by the nation against whose nationals those acts are directed as a *casus belli*; that they are not rights in the legal sense of the term, but are in the nature of belligerent or quasi-belligerent rights; and lastly that they are to be resorted to only if other means, diplomatic representations and the like, have failed.

I will only read one sentence in justification of that last which is an important point. He says :

As in other cases the danger must be serious and imminent, and prevention, through the agency of the State whose rights are disregarded, must be impossible.

One observation I should like to make which I had intended yesterday to make in connection with the case of *Church v. Hubbard* with which I dealt at length, and as to which I also cited the comment and criticism of Mr Dana in his edition of "Wheaton's International Law". My learned friend, Mr Carter, referred to an *obiter dictum* of Chief Justice Cockburn in the celebrated case of the *Queen v. Keyn*, as though it added force or authority to the expression of opinion of Chief Justice Marshall. The Chief Justice Cockburn was not concerned in considering the question of the limitation of rights internationally considered at all. He was concerned with the question which I endeavoured to explain yesterday whe-

ther, according to the law of England, although the three-mile zone was internationally regarded as part of the territory of the country, it could be so regarded as to bring it within the area of the criminal jurisdiction of the country without express legislation; and it was therefore merely incidental to the consideration of that question that he refers to the authority of, among others, Chief Justice Marshall, an authority which I do not dispute. The learned Judge's dictum was addressed to the case of an invasion of the revenue law; and although the seizure in that case was at a greater distance than, I think, has ever been recognized as within proper limits by any other Judge, yet it is to be observed that Chief Justice Marshall was not considering the question as between a nation asserting the right and a nation resisting the right, but was merely called upon to determine in that particular case whether the risk of the seizure which, in fact, took place, was or was not a risk contemplated by the parties within the meaning of a particular contract of insurance.

Now I think I have come to the end of the citation of authorities, and I wish to put the points finally as they come up for adjudication by this Tribunal.

First, as to the seizures, I have argued the question whether or not those seizures could be justified upon any principle recognized by international law and I have endeavoured to establish — I hope I have successfully established — that they cannot be so defended. It is a fact to which I have not previously called the attention of the Tribunal that when in their Counter Case the United States are called upon to justify those seizures, they justify them upon one ground, and upon one ground only.

If you, Mr President, will be good enough to turn to page 130 of the Counter Case you will see what I mean. On the previous page 129, they have admitted the seizures as to some vessels, and the orders of expulsion from Behring Sea in prohibition of sealing as regards other vessels, and in the next page they proceed to justify those seizures, the marginal note being "Reasons why seizures made".

The United States charge that each and all of the vessels when so seized were engaged in the hunting of fur-seals in the waters of Behring Sea in violation of the statutes of the United States, and that such seizures were made in accordance with the laws of the United States enacted for the protection of their property interest, in the fur-seals which frequent Behring Sea and breed only upon the Pribilof Islands which Islands are part of the territory of the United States, and that the acts of the crews if permitted would exterminate the Alaskan seal herd and thereby destroy an article of commerce valuable to all civilized nations.

You will see therefore that in their Counter Case there is no suggestion of that contention, which I may have to say a final word or two about, that these provisions, although there is no justification for them, as Mr Carter admitted, as a statute, may yet be treated as defensive regulations.

That is an idea which is attributable to the ingenuity of my learned friends and which appears developed for the first time in the printed Argument, but does not appear in the Case, or, as I have said, even in the Counter Case.

Now, Senator Morgan yesterday made a suggestion to the effect that these were mere acts in defence of property; but I would point out that the acts complained of were of three kinds; first, as regards vessels engaged in sealing, next as regards vessels that had been engaged in sealing, and, lastly, as regards vessels equipped for the purpose of being engaged in sealing.

And I have to point out that while, if the fur-seal is to be treated as an article of property, there is, the right to defend it in the high sea, if it is attacked, — while I concede that, what lies upon my learned friends to show is that even if there is such property right, the consent of nations has been given, and that international law has sanctioned, any other than the ordinary right of defence of possession which belongs to an individual owner of property; and if it be objected that, in the case of the fur-seal, the property is of so volatile a kind that that mere right of defence of possession would be inadequate, I answer, first, that the very circumstance of it being of so volatile a character goes some way to show how impossible it is to conceive the idea of property in it. But, in the next place, I have to say that the volatile character of the property cannot alter the rights, internationally recognized, in regard to it; any more than in the case of a great frontier or an extended coast which needed to be defended by an adequate Police-force in order to prevent a violation of its Revenue Laws, — any more than in such a case it would be admissible for the Power possessing that frontier, and desiring to save the expense of adequately guarding it, to resort to extreme, or cruel, or violent measures in order to strike terror into possible offenders, and prevent the invasion of that frontier line for illicit purposes. It is a proposition which needs a justification that authority does not give it; — that even if an item — because the principle must go that length, — of the property of a nation, however unimportant in value, is seized, it will justify that nation in seizing upon the high seas, the ship in which this property is, and in condemning that ship. Some warrant in international law must be shown in support of so serious a proposition.

I will put the case in this way, and I invite my friend Mr Phelps' attention to it when he comes to address you : it is conceded for the purpose of justifying what are the international rights, and what are the international sanctions attached to those rights, that the municipal statute may be treated as if it did not exist — that it may be rubbed out of the record. And now my friend will have the opportunity of telling us to what form of libel he, as a lawyer (if that municipal statute did not exist) could put his name, and which he would maintain in argument before Judges, which could justify the action which has taken place in regard to these ships belonging to Great Britain.

I have dwelt — I do not intend to recur to it — upon the fact that from the first to the last the proceeding has been based upon the municipal statute, for breach of the municipal statute, and for breach of the municipal statute alone. I wish to say a word or two about the point of whether it is possible, now, to turn this municipal statute (even if there were international warrant for the sanction it contains), into a self-preservative regulation.

Now, Mr President, I submit that the contention that a Government, proceeding upon a municipal statute, invoking the aid of its municipal Judge to enforce that statute, charging the British subject libelled with an offence against that statute and against that statute alone, should now be heard to say that it can justify its proceedings as an offence against international law, is a very startling proposition. But it is still more startling that a Defendant who has been libelled — whose ship has been confiscated and confiscated upon the ground that he had committed an offence against the municipal statute, is now to be told that he is charged with, and his property confiscated upon the ground of, an international offence of which he was never informed, and which he was never called upon to answer. And, lastly, the proposition is still more startling when you consider the attitude of a Government towards the Judge of its own Court. It appeals to that Judge to put in force the municipal statute; it asks his aid upon the ground that an offence has been committed within the area to which that statute relates. The judge proceeds upon that basis; he considers the question in that relation alone, and yet we are to be told that he was acting as an international Judge — as Judge of a war Tribunal — although he did not know it : that he was dealing with and proceeding upon the basis of great principles of international law which closely touch the sovereignty of nations and the peace of the world, although his judgment shows that he had not in his remotest apprehension the consideration of the most elementary principles of international law itself. No, Mr President, this matter rests, must rest, for its justification upon the grounds which they have put forward and put forward with so much deliberation — the grounds taken in the diplomatic correspondence, the grounds taken in their libel in Court, because the Tribunal will not forget the emphatic statement of counsel to which I have previously adverted, that after stating their case founded upon the assumption of territory, basing the assumption of that territory upon the derivative title from Russia, their argument and libel conclude with the emphatic words :

Such is our understanding of the law, such is the record; upon them the United States are prepared to abide the judgement of the Court and the opinion of the civilized world.

I have only in this connection one other concluding remark to make — it touches a subject to which I have previously frequently adverted. It is to point out that no instance can be cited, which I am aware of,

in which the provisions of a municipal statute intended to operate — avowedly intended to operate — as a statutory authority and a statutory authority only, has ever been treated as a self-defensive, or as a selfpreservative, regulation. Indeed, when you come to consider the principle to which I have just adverted — the principle of sudden danger and emergency, leaving no opportunity for consideration or device of means — you cannot fail to determine that the notion of an elaborate and carefully prepared Code of punishments is inconsistent with the notion of what a Nation may do in its sudden emergency: and it is, as Mr Webster well put it, that very consideration which lies at the basis of this whole doctrine of what a nation may resort to in the case of sudden emergency.

Now, I have done with this, and I leave the subject; but I wish to point out that, except as regards what has taken place, namely the seizures, this question is of no future practical importance for the reason which I will make apparent in a moment. It is necessary to consider it in relation to the question of the unwarrantable character of the seizures; but, if this Court were to affirm a right in the United States in relation to the fur-seals, I need not tell this Tribunal that the question of what international rights of protection the United States possess, would become practically immaterial, because Great Britain would be bound, in good faith, to respect the affirmation of any right which this Tribunal declared to exist, and to enjoin upon its nationals the avoidance of any disturbance of that right. Therefore, except as regards the past seizures the question is one of relatively small importance.

I have thought it right to argue this question of what are the rights of protection even on the assumption that there was a *right* to protect; but, of course, I have but ill-succeeded in my task if I have not conveyed to this Tribunal that the main stress and burden of my argument has been addressed to the denial of any such right in whatever form that right is suggested. In connection, therefore, with the seizures, I have, with the assistance of my learned friends, framed the questions of fact which we submit this Tribunal may properly be called upon to answer in the manner which I am now about to take the liberty of suggesting. They have been shown to my learned friend Mr Phelps, and although his opportunity of considering them was limited, and I do not consider him debarred in any way from criticising them when he has more time for deliberation, I think I am justified in saying that so far as he has read them they do not deal with anything except facts which are not in dispute.

Mr Phelps. — I ought to say, perhaps, in justice to Sir Charles, that I made an observation that quite justifies what he has just said in respect of these statements. On another perusal, I think that perhaps one of these statements may be open to criticism, and therefore it is only fair to state, now, the only point we shall make in respect of them. We conceive —

Sir Charles Russell. — I think my friend had better reserve that. I will read them and presently you can have an opportunity of stating your view.

Mr Phelps. — Certainly, unless it is your convenience.

Sir Charles Russell. — Thank you, I do not think so. I have said my friend is not in any way estopped from criticising them, but I think it will be found that they will not be open to any objection as to raising any fact not in dispute. It is quite right that this Tribunal should be relieved, as far as possible, from determining questions of fact. For instance, it is suggested in the United States Case that some of the ships were really owned by United States citizens, and that therefore, as these men were offending against the laws of their own country that they ought not to be compensated for the loss of their ships.

That is, of course, a perfectly legitimate point to raise. We do not think, in point of fact, it is well founded, and it happened that one of these reputed owners was in Paris a few days ago — I believe is still — and we suggested to our friends whether it might not be a convenient opportunity for getting his examination and cross-examination taken upon this question before a commissioner; but my friends — I make no complaint of it — thought that was hardly a mode of procedure contemplated by the Treaty, so that any question of fact of that kind must be left open to either party to prove or to dispute at the convenient time when the subsequent question of liability and the measure of liability are in question.

Lord Hannen. — Unless I am mistaken it is a question of fact that neither of you call upon this Tribunal to decide?

Sir Charles Russell. — That is so.

The only facts we call upon the Tribunal to determine, are those which I will now take the liberty to read.

The British Government having submitted to the Arbitrators certain questions of fact as involved in the claims for damages set forth in the Schedule to the British Case, pages 1 to 60 inclusive, ask for the follow findings thereon, namely : —

1. That the several searches and seizures, whether of ships or goods, and the several arrests of masters and crews, respectively mentioned in the said Schedule, were made by the authority of the United States Government.

2. That they were made in non-territorial waters.

3. That the several searches, seizures, condemnations and confiscations whether of ships or goods, and the several arrests fines and imprisonments, were for alleged breaches of municipal laws of the United States, which alleged breaches were wholly committed on the high seas outside the territorial waters of the United States.

The President. — You do not consider that is undisputed — just that point.

Sir Charles Russell. — I confess I think it is undisputed. I think it cannot be denied that the several searches were made, the seizures were made, the condemnations were made, the confiscations were made, as for breaches of municipal law.

Mr Carter. — There is an implied statement there which we deny.

Sir Charles Russell. — I think, as a matter of fact, it cannot be denied — I think it is correct.

The President. — I do not believe it is undisputed.

Sir Charles Russell. — It is difficult to say what is not disputed. My friend Mr Carter says there is something implied here, which is not admitted.

Mr Carter. — We will present our view of it.

Sir Charles Russell. — Quite so.

Then 4th :

That the several orders, mentioned in the said Schedule, whereby ships were prevented from pursuing their voyages, were given on the high seas outside territorial waters under the authority of the United States Government and in execution of the municipal laws of the United States; and

5. That the said several searches, seizures, condemnations, confiscations, fines, imprisonments and orders were not made imposed or given under any claim or assertion of right or jurisdiction except such as is submitted to the decision of the Arbitrators by the questions in Article VI of the Treaty of Arbitration.

That I think covers the whole ground. At all events we will take the opportunity of handing a copy of those questions to the members of the Tribunal.

The President. — You imply, by that last question, that we are perfectly competent to decide all the questions of law which are involved by the seizures?

Sir Charles Russell. — This is a question of fact which we are asking you to find. We are asking you to find that, in fact, the seizures, condemnations, and confiscations, were not made except upon a claim or assertion of right covered by the Treaty. The 5th finding proposed is practically intended to assert, as a fact, that the grounds upon which it is even now sought, (whether by municipal statute, or self-defensive, or self-preservative regulations) are covered by the Treaty. About that, I think there is no room for doubt.

The President. — May I, once more, put the same question on that : Do you believe that that fifth question of yours is undisputed ?

Sir Charles Russell. — Absolutely, I think : although, as I said just now it is very difficult to say what is not disputed. I cannot conceive that it can be disputed : because its dispute would mean this — that there is some ground behind, which has never appeared in the whole course of these years and is not adverted to either in the correspondence, the Case, Counter Case, or Argument upon which the United States can justify what it has done, — and which has not been submitted to this Tribunal.

The President. — Perhaps Mr Phelps will be kind enough, in his turn, to tell us whether he accepts this, or whether he intends to dispute it.

Mr Phelps. — Certainly.

Sir Charles Russell. — Now I wish to get on, with the permission of the Tribunal. I wish to relieve, and am glad to relieve, the Tribunal of one question at all events, and that is the question of damages under Article V of the *modus vivendi* of 1892, which is also remitted to this Tribunal. This, Sir, will not need any troublesome reference, because it is an admission I am going to make. At page 216 of the printed Argument of the United States (you need not, Sir, trouble to refer to it, if I may be

permitted to say so, because it is not a point of difference between us — it is a matter I am clearing out of the way) — the United States give up any claim to damages under that Treaty; and I have to say, on the part of Great Britain, and speaking with authority in the matter, that although they had under the earlier *modus vivendi* to pay a very large sum for damages to their Canadian sealers — a sum I think exceeding \$ 100,000 — looking to the fact nevertheless, that under the *modus vivendi* in question a great many, at least, if not all of the sealers who would have resorted to the eastern part of Behring Sea had made catches of seals in other parts of the ocean, and although I think it might be argued that this Tribunal is required by Article V to give damages on the basis of a limited catch or catches which might have been taken in Behring Sea — in all the circumstances of the case Great Britain does not desire to press that view upon the Tribunal, and therefore, will ask for no finding for damages upon and under that 5th article of the *modus vivendi*; but it probably will be convenient in the Award which the Arbitrators may think proper to make, to state upon its face that both the United States and Great Britain have abandoned any claim for damages under that head.

The President. — You are agreed also as to that, Mr Phelps.

Mr Phelps. — Yes.

The President. — I am not quite sure, speaking for myself, that the question of compensation was referred to the Arbitrators. I am not quite sure that Article V is to be construed in that way as to compensation.

Sir Charles Russell. — If we agree to relieve you of it, Sir, it is unnecessary to discuss it.

The President. — Of course, it is more easy to agree about a difficult question than to have it decided by us.

Sir Charles Russell. — Now, Sir, I come to the important questions in the case. As regards those questions, my respect for Senator Morgan induces me to say one word. Senator Morgan has more than once, as I understood, suggested that the answers to the five points, as they are set out in Article VI, do not exhaust the duty and functions of this Tribunal as to the questions in dispute submitted to this Tribunal for adjudication. Well, if that be so, — if Senator Morgan be right in that — I need not say it would be the duty of this Tribunal to consider any question referred to them under the whole Treaty if it is not found to be dealt with, and met by, the answers to those five points. But, as I submit respectfully to Senator Morgan, they are adequately dealt with as the result, or by the result of the answers of the Tribunal to each of those questions. For instance, Senator Morgan was good enough to refer me to the introduction to the Treaty, and to the first Article of the Treaty which repeats the introduction; namely, that, amongst the questions which have arisen between the two Governments, there are some which concern the jurisdictional rights of the United States in the waters of Behring Sea; others which concern the preservation of the fur-seal in or habitually resorting to the said Sea; and others again which concern the

rights of the citizens and subjects of either country as regards the taking of fur-seal in or habitually resorting to the Behring Sea.

Now I think, if the learned Senator will consider, he will see that every one of those questions will be in fact dealt with by the answers to one or other of those five questions. For instance, in determining what the exclusive jurisdiction if any Russia had, what recognition there was of this exclusive jurisdiction by Great Britain, whether Behring Sea was included in the phrase “ Pacific Ocean ”, and the effect of the cession of the rights of Russia to the United States — the determination of these matters will dispose of the class of questions which have been grouped together as jurisdictional or territorial questions.

And then as to the question of the right of the United States as to property or protection in the fur-seal : equally the answer to that question would seem to me to dispose of the question, What were the rights of the respective nationals ? because if the United States citizens have no exclusive or exceptional right, then the great and broad principle remains — we care not whether it is stated on the face of the Award or not, the Award will give it no greater sanction — that all men are equal on the high sea and have the right to take from it the products of the high sea according to the measure of their opportunity and their will. Thus the whole question of the respective rights will have been determined. But if I should not be right in that, the Tribunal will themselves judge, and they will frame their answers so as to cover the view which has been suggested by Senator Morgan. I content myself, therefore, with reminding the Tribunal that at page 26 of the printed Argument, we have formulated the answers which we conceive the facts and the law justify us in calling upon this Tribunal to make. These relate to the first four of the questions.

First :

That Russia exercised no exclusive jurisdiction in Behring Sea prior to 1867 ; that, in 1821 only, Russia asserted exclusive jurisdiction over a part of Behring Sea along its coasts, but that she withdrew the assertion, and never afterwards asserted or exercised such jurisdiction.

That Russia exercised no exclusive rights in the seal fisheries in Behring Sea prior to 1867 ; that in 1821 only, Russia claimed exclusive rights, as included in her claim of jurisdiction extending to 100 miles from the coast, but that she withdrew the assertion, and never afterwards asserted or exercised such rights.

The only exclusive right which Russia subsequently exercised was the right incidental to her territorial ownership.

Then as to question 2 :

That Great Britain neither recognized nor conceded any claims of Russia of jurisdiction as to the seal fisheries, *i.e.*, either (a) of exclusive jurisdiction in Behring Sea, or (b) exclusive rights in the fisheries in Behring Sea, save as already mentioned.

Mr Justice Harlan. — What do you mean by “ exclusive rights in the fisheries in Behring Sea ? ” You do not include the business con-

ducted on the Islands, do you? Do you mean that Great Britain did not concede Russia's exclusive right on the Islands?

Sir Charles Russell. — Not at all; we are not dealing with the rights *ratione soli*: those are not in dispute. We deny the existence of any exclusive rights outside territorial limits. Our contention is that the only rights which Russia had or exercised were such rights as were incidental to her territorial ownership.

Lord Hannen. — The words are, “ save as already mentioned ”.

Sir Charles Russell. — That is so. The form of the Treaty is curious. It may have escaped notice that the first question in Article VI deals with exclusive rights in the seal fisheries, and therefore we have adopted the language of the question; whereas question N° 5 alters the phraseology and says “ protection or property in the fur-seals ”. The answer, therefore, is adapted to the phraseology of the question.

Now for the third answer, (which Mr Blaine told us would be decisive of the matter), we contend that the answer should be :

That Behring Sea was included in “ Pacific Ocean ” in the Treaty of 1825.

That Russia neither held nor exclusively exercised any rights in Behring Sea after the Treaty of 1825, save only such territorial rights as were allowed to her by international law.

Then the answer we suggest to question 4 is : —

That no rights as to jurisdiction or as to the seal fisheries in Behring Sea east of the water boundary, in the Treaty between the United States and Russia of the 30th March, 1867, passed to the United States under that Treaty, except such as were incidental to the islands and other territory ceded.

In other words, that no more passed (and it is not contended that more did pass to the United States) than Russia possessed, and that Russia's rights were the rights of a territorial owner and no more.

There will then remain the 5th question, the answer to which is formulated on page 63 of the printed Argument, thus :

That the United States have no right (*a*) of protection, or (*b*) of property in the seals frequenting the islands of the United States in Behring Sea when they are outside the ordinary three-mile limit.

Now, I have only one other word to say. I have been dealing solely with the question of legal right; I have not said one word, nor shall I say one word, in this connection, with a matter entirely distinct, to be approached from an entirely different standpoint, — the question of Regulations. I will only say what I have previously said, what the correspondence of the representatives of Great Britain justifies me in saying, that Great Britain is now, as she has always professed to be, ready to consider the question of Regulations upon a fair basis, — upon the basis of a common interest to be safeguarded.

Very little remains now for me to say, Mr President. I have to submit that in none of the forms in which this claim has been presented, shifting and varying as they have been, is that claim maintainable in point of law, whether it is to be regarded as a claim by derivative title from Russia which was the case originally put forward, but which has now been allowed

to recede largely into the back ground : or whether it is a case of property in the individual fur-seal or in the fur-seal collectively, or in an industry said to be founded on the fur-seals with, or apart from, a claim of property in the fur-seals themselves.

In every form in which it can be put, or in which human ingenuity can suggest that the claim can be put, we submit that it is untenable. It is opposed to that great principle which lies at the very root of this whole controversy, the principle of the freedom of the sea, the principle that upon the sea the ships of all nations are equal, whether they be ships of a great power or ships of an insignificant power; the principle that upon the high sea the ships of each nation are part of the territory of that nation; the principle that upon the high sea the nationals of every nation can take at their will, at their pleasure, according to their ability, from the products of the sea.

And, Mr. President, it is no light matter that this is the first time in the history of the world that any nation, or any individual of a nation, has ever claimed a right of property in any free-swimming animal in the ocean, that this is the first time in which an exception has been sought to be made in the case of the fur-seal from the right of all mankind to take from the ocean the fish and the animals that it contains.

The advancement of these propositions is grave enough; still graver the sanctions which are invoked, forsooth, in the name of international law for the vindication and for the defence of these extravagant and unfounded pretensions. For what are those sanctions? They are the affirmation of the right on the part of the United States, and for all time, to search, to seize, to condemn, vessels of a friendly Power engaged in pelagic sealing or about to engage in pelagic sealing, or which have been engaged in pelagic sealing and to take from them the seals that they have acquired, or to drive them from the waters, with a show of force, to the ports from which they sailed. In other words, it is no less than this — the assertion in support of this supposed right of those acts of high authority on the high seas which are only permitted by international law to belligerents, or only allowed to be exercised against pirates with whom no nation is at peace.

Mr President, I have endeavoured to argue this question with as much closeness of reasoning as I could command. I have not indulged in vague speculation, nor embarked upon metaphysical discussion. I have felt it to be my duty to try and assist the Tribunal in ascertaining what the Law is, because, as I have previously taken the opportunity of saying I conceive it to be the function of this Tribunal not to make law but to declare the law; not to consider what the law ought to be; but to say, upon their responsibility, what the law is, — not to formulate new rights, but to affirm what, in their judgment, they believe to be existing rights.

In this domain of law, the armoury of argument is full. Here, indeed are the weapons of Achilles; but where are the strength and skill to use them with their full force and effect?

I have dealt with the law as I believe it to be. I am content to think that that law, as it has come down to us, fashioned by the wisdom of ages modified by the experience of Human Society, in its evolution is a fitting and noble instrument to serve the just purposes and uses of Mankind in the adjudication of their rights.

My friend, Mr Carter, in his impressive opening, well said that this submission to arbitration was a great fact. Mr President, it is a great fact — a fact of weighty moral significance.

There are two great Powers before you: One, a representative of the civilization of the Old World, great in its extent of dominion, greater still in its long enduring traditions of well-ordered liberty and in the stability of its ancient Institutions; the other a young but stalwart member of the Family of Nations, great also, in its extent of territory, in the almost boundless resources at its command, great, too, in the genius and enterprise of its people, possessing enormous potentialities for good on the future of the human race. These Powers are in difference. Great Britain conceives that she has been wronged by these seizures, as we submit justly so conceives, that her sovereignty has been invaded; her rights upon the high sea, represented by her nationals, set at nought. Happily the dread extremity of war was avoided. These nations have not sought to turn their ploughshares into swords to settle their differences. They are here before you, friendly litigants, peaceful suitors in your Court, asking by pacific means the adjustment and the determination of their rights in times of peace. This is, indeed, a fact of great moral significance.

Peace hath her victories not less renowned than war.

This arbitration is, who will gainsay it? who can gainsay it? — a victory for peace. Will your award be a victory for peace? You, Gentlemen of this Tribunal, alone can answer.

It will be, it must be, a victory for peace if, as I cannot permit myself to doubt, it conform to and leave untouched and undoubted the principles of that law which have been consecrated by long usage and stamped with the approval of generations of men: that law which has, after all, grown up in response to that cry of humanity heard through all time, a cry sometimes inarticulate, sometimes drowned by the discordant voices of passion, pride, ambition, but still a cry, a prayerful cry, that has gone up through all the ages, for peace on earth and good will amongst men.

The President. — Sir Charles, we have to thank you for the great pains you have taken in making clear the very intricate questions brought before us for decision. You have reaped so much applause in the course of your profession as a lawyer and far-famed speaker, that what I might add would be but of small purport. I will merely say that the vigour and incisiveness of your argument have been fully appreciated. We feel that England has done honor to this Tribunal when she chose as her counsel in this memorable case one of her ablest and most powerful legal debaters.

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